



October 2021

# **Metropolitan Region Scheme Amendment 1377/57 (Minor Amendment)**



## **Forrestfield North Environmental Conservation Areas**

Submissions 1 – 13  
Volume 1 of 2

City of Kalamunda



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**Metropolitan Region Scheme  
Amendment 1377/57  
(minor amendment)**

**Forrestfield North  
Environmental Conservation Areas**

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**Submissions 1 – 13**

**Volume 1 of 2**

**City of Kalamunda**



October 2021

The Western Australian Planning Commission acknowledges the traditional owners and custodians of this land. We pay our respect to Elders past and present, their descendants who are with us today, and those who will follow in their footsteps.

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Gordon Stephenson House  
140 William Street  
Perth WA 6000

Locked Bag 2506  
Perth WA 6001

MRS Amendment 1377/57      Submissions 1 –  
File 833-2-24-66 Pt 2      13 Volume 1 of 2

Published October 2021

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This document is available in alternative formats on application to the Department of Planning, Lands and Heritage Communications Branch.

## Introduction to Metropolitan Region Scheme minor amendments

The Western Australian Planning Commission (WAPC) is responsible for keeping the Metropolitan Region Scheme under review and initiating changes where they are seen as necessary.

The Metropolitan Region Scheme (MRS) sets out the broad pattern of land use for the whole Perth metropolitan region. The MRS is constantly under review to best reflect regional planning and development needs.

An amendment proposal to change land use reservations and zones in the MRS is regulated by the *Planning and Development Act 2005*. That legislation provides for public submissions to be made on proposed amendments.

For a non-substantial amendment, often referred to as a minor amendment (made under section 57 of the Act), the WAPC considers all the submissions lodged, and publishes its recommendations in a report on submissions. This report is presented to the Minister for Planning for approval. The amendment takes legal effect with Gazettal of the Minister's approval.

In the process of making a non-substantial amendment to the MRS, information is published as a public record under the following titles:

### **Amendment report**

This document is available from the start of the public advertising period of the proposed amendment. It sets out the purpose and scope of the proposal, explains why the amendment is considered necessary, and informs people how they can comment through the submission process.

### **Environmental review report**

The Environmental Protection Authority must consider the environmental impact of an amendment to the MRS before it can be advertised. While formal assessment would be unlikely for a non-substantial amendment, were it required then an environmental review would be undertaken and made available for information and comment at the same time as the amendment report.

### **Report on submissions**

The planning rationale, determination of submissions and the WAPC's recommendations for final approval of the amendment, with or without modification, is documented in this report.

### **Submissions**

This document contains a reproduction of all written submissions received by the WAPC on the proposed amendment.



## Alphabetical Listing of Submissions

MRS Amendment 1377/57

### Forrestfield North - Environmental Conservation Areas

<b>Submission Number</b>	<b>Name</b>
8	ATCO Gas Australia Pty Ltd
13	De Reggi, Lynette & Miles, Peter
6	DoCouto Azcarate, Andrea
12	Education, Department of
4	Health, Department of
1	Jobs, Tourism, Science and Innovation, Department of
10	Kalamunda, City of
9	Main Roads WA
5	Mines, Industry Regulation and Safety, Department of
7	Public Transport Authority
3	Transport, Department of
11	Water and Environmental Regulation, Swan Avon Region, Department of
2	Water Corporation

<b>Late Submissions</b>	<b>Name</b>
14	Biodiversity, Conservation and Attractions, Swan Region, Department of





**Submissions**





Your ref: 1377/57 - 833-2-24-66 Pt 1 (RLS/0926)  
1378/57 - 833-2-21-131 Pt 1 (RLS/0927)  
Our ref: J0820/201701  
Enquiries: freya.symons@jtsi.wa.gov.au  
Phone: 08 6277 2914

Ms Sam Fagan  
Secretary  
Western Australian Planning Commission  
140 William Street  
PERTH WA 6000

Department of Planning, Lands and Heritage Received	
Scanned	9 OCT 2020
Attachments	<input type="checkbox"/>
Scan QA	<input type="checkbox"/>
Doc No.	<input type="checkbox"/>
File No.	RLS/0926

Dear Ms Fagan

Thank you for providing the Department of Jobs, Tourism, Science and Innovation with the opportunity to comment on the following two minor amendments to the Metropolitan Region Scheme:

- Forrestfield North Environmental Conservation Areas
- Lot 71 Chateau Place and Lot 72 Millhouse Road, Aveley

The Department has reviewed the minor amendments, which proposed zoning changes, and has no comment to provide at this time.

Yours sincerely

Kristian Dawson  
A/EXECUTIVE DIRECTOR  
INFRASTRUCTURE, PLANNING AND ECONOMIC DEVELOPMENT

6 October 2020

Development  
Services

629 Newcastle Street  
Leederville WA 6007

PO Box 100  
Leederville WA 6902

T (08) 9420 2099  
F (08) 9420 3193



Your Ref: RLS/0939; MRS1377/57  
Our Ref: 57126057 (MRS370524)  
Enquiries: Brett Coombes  
Direct Tel: 9420 3165  
Fax: 9420 3193

07 October 2020

Secretary  
Western Australian Planning Commission  
LOCKED BAG 2506  
PERTH WA 6001

Attention: Anthony Muscara

**MRS Minor Amendment 1377/57 - Forrestfield North conservation areas**

I refer to your notification of 2 October 2020 inviting comments on the above amendment.

The Water Corporation has no objections to the amendment. The proposals do not appear to have any impacts on existing or planned Water Corporation infrastructure.

If you have any further queries in this regard please contact me on Tel. 9420-3165.

A handwritten signature in black ink that reads "B. Coombes". The signature is written in a cursive style with a large initial 'B' and a trailing flourish.

Brett Coombes  
Senior Urban Planner  
Development Services

**From:** mrs  
**Subject:** FW: Metropolitan Region Scheme Amendment: 1377/57 – Forrestfield North – Environmental Conservation Areas

**From:** Fogarty, Louise [<mailto:Louise.Fogarty@transport.wa.gov.au>]  
**Sent:** Thursday, 15 October 2020 12:38 PM  
**To:** Anthony Muscara <[Anthony.Muscara@dph.wa.gov.au](mailto:Anthony.Muscara@dph.wa.gov.au)>  
**Subject:** Metropolitan Region Scheme Amendment: 1377/57 – Forrestfield North – Environmental Conservation Areas

Your ref: 1377/57 833-2-24-66 Pt 1 (RLS/0926)  
Our ref: DT/15/05069

Dear Anthony

**Metropolitan Region Scheme Amendment: 1377/57 – Forrestfield North – Environmental Conservation Areas**

I refer to your letter dated 23 September 2020 regarding a request for comment for the abovementioned amendment.

The Department of Transport (DoT) has no comment to provide for the above.

Thank you for the opportunity to comment on the proposal.

Regards,  
Louise

**Louise Fogarty**  
**Senior Transport Planner | Urban Mobility | Department of Transport**  
Level 8, 140 William Street, Perth WA 6000  
Tel: (08) 6551 6840 | Fax: (08) 6551 6492  
Email: [Louise.Fogarty@transport.wa.gov.au](mailto:Louise.Fogarty@transport.wa.gov.au) | Web: [www.transport.wa.gov.au](http://www.transport.wa.gov.au)



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Your Ref: 1377/57 – 833-2-24-66 Pt 1 (RLS/0926)  
Our Ref: F-AA-70762 D-AA-20/151879  
Contact: Vic Andrich 9222 2000

Ms Sam Fagan  
Secretary  
Western Australian Planning Commission  
Locked Bag 2506  
PERTH WA 6001

Attention: Anthony Muscara

**Via email:** [mrs@dph.wa.gov.au](mailto:mrs@dph.wa.gov.au)

Dear Ms Fagan

**METROPOLITAN REGION SCHEME AMENDMENT – 1377/57 – REZONE FROM  
'URBAN' AND 'RURAL' ZONES TO 'PARKS AND RECREATION' AND SMALL  
AREA OF 'URBAN' ZONE FOR FUTURE 'LOCAL PUBLIC OPEN SPACE' -  
FORRESTFIELD NORTH – ENVIRONMENTAL CONSERVATION AREAS**

Thank you for your letter of 23 September 2020 requesting comments from the Department of Health (DOH) on the above proposal.

The DOH has no objection to the proposed amendment.

Should you have any queries or require further information please contact Vic Andrich on 9222 2000 or [ehinfo@health.wa.gov.au](mailto:ehinfo@health.wa.gov.au)

Yours sincerely

Dr Michael Lindsay  
**EXECUTIVE DIRECTOR  
ENVIRONMENTAL HEALTH DIRECTORATE**

13 November 2020



Your ref MRS1377/57 MRS1378/57

Our ref A1687/202001

Enquiries Steven Batty  
9222 3104

Steven.BATTY@dmirs.wa.gov.au

Anthony Muscara  
Principal Planning Officer  
Western Australian Planning Commission  
Sent by Email – info@dplh.wa.gov.au  
Perth WA 6000

**Attention:** Marija Bubanic

Dear Mr Muscara

**METROPOLITAN REGION SCHEME AMENDMENTS - MRS 1377/57  
FORRESTFIELD NORTH ENVIRONMENTAL CONSERVATION AREAS - MRS  
1378/57 LOT 71 CHATEAU PLACE LOT 72 MILLHOUSE ROAD AVELEY**

Thank you for your letter dated 30 September inviting comment on the above proposal for Metropolitan Region Scheme Amendments - MRS 1377/57 Forrestfield North Environmental Conservation Areas - MRS 1378/57 Lot 71 Chateau Place Lot 72 Millhouse Road Aveley.

The Department of Mines, Industry Regulation and Safety has determined that this proposal raises no significant issues with respect to mineral and petroleum resources, geothermal energy, and basic raw materials.

Yours sincerely

*Samantha Carter*

---

Samantha Carter  
Acting General Manager Land Use Planning  
Minerals and Petroleum Resources Directorate  
29 October 2020

Submitted to **MRS minor amendment 1377/57 - Forrestfield North Environmental Conservation Areas**  
Submitted on **2020-11-18 13:36:23**

**Submission**

**1 What is your first name?**

**First name:**

Andrea

**2 What is your surname?**

**surname:**

DoCouto Azcarate

**3 What is your email address?**

**Email:**

a.docouto24@gmail.com

**4 What is your address?**

**address:**

**5 Contact phone number:**

**phone number:**

0444517345

**6 Do you support/oppose the proposed amendment to the Metropolitan Region Scheme?**

Support

**7 Submission (reasons for support/opposition). Please type your submission into the box below or copy and paste text from a Microsoft Word document.**

**Submission:**

**File upload:**

No file was uploaded

**File upload:**

No file was uploaded

**File upload:**

No file was uploaded

**File upload:**

No file was uploaded

**File upload:**

No file was uploaded

**8 All submissions will be published as part of the consultation process. Do you wish to have your name removed from your submission?**

No



Submitted to **MRS minor amendment 1377/57 - Forrestfield North Environmental Conservation Areas**  
Submitted on **2020-11-19 15:45:31**

**Submission**

**1 What is your first name?**

First name:

**2 What is your surname?**

surname:

**3 What is your email address?**

Email:

**4 What is your address?**

address:

**5 Contact phone number:**

phone number:

**6 Do you support/oppose the proposed amendment to the Metropolitan Region Scheme?**

Support

**7 Submission (reasons for support/opposition). Please type your submission into the box below or copy and paste text from a Microsoft Word document.**

**Submission:**

Thank you for your letter requesting comment from the Public Transport Authority. The PTA has no objections to the MRS Amendment.

Regards

Public Transport Authority of Western Australia  
Level 4, Public Transport Centre, West Parade, Perth, 6000  
PO Box 8125, Perth Business Centre, WA, 6849  
Tel: (08) 9326 2473

| Web: [www.pta.wa.gov.au](http://www.pta.wa.gov.au)

**File upload:**

No file was uploaded

**File upload:**

No file was uploaded

**File upload:**

No file was uploaded

**File upload:**

No file was uploaded

**File upload:**

No file was uploaded

**8 All submissions will be published as part of the consultation process. Do you wish to have your name removed from your submission?**

Yes

Submitted to **MRS minor amendment 1377/57 - Forrestfield North Environmental Conservation Areas**  
Submitted on **2020-11-20 07:44:36**

**Submission**

**1 What is your first name?**

First name:

**2 What is your surname?**

surname:

**3 What is your email address?**

Email:

**4 What is your address?**

address:

**5 Contact phone number:**

phone number:

**6 Do you support/oppose the proposed amendment to the Metropolitan Region Scheme?**

Support

**7 Submission (reasons for support/opposition). Please type your submission into the box below or copy and paste text from a Microsoft Word document.**

**Submission:**

ATCO owns and operates gas mains and gas infrastructure predominantly located within road reserves. The proposed Amendments will not impact on our existing network.

**File upload:**

No file was uploaded

**File upload:**

No file was uploaded

**File upload:**

No file was uploaded

**File upload:**

No file was uploaded

**File upload:**

No file was uploaded

**8 All submissions will be published as part of the consultation process. Do you wish to have your name removed from your submission?**

Yes



**mainroads**  
WESTERN AUSTRALIA

**SUBMISSION**  
**9**

Enquiries: Catherine Spradbrow on (08) 9323 5817  
Our Ref: 19/818 (D20#1087541)  
Your Ref: 1377/57 – 833-2-24-66 Pt 1 (RLS/0926)

2 December 2020

The Secretary  
Western Australian Planning Commission  
Locked Bag 2506  
PERTH WA 6001

Email: [mrs@dplh.wa.gov.au](mailto:mrs@dplh.wa.gov.au) and [anthony.muscara@dplh.wa.gov.au](mailto:anthony.muscara@dplh.wa.gov.au)

Dear Sir/Madam

**RE: Metropolitan Region Scheme Proposed Amendment 1377/57 –  
Forrestfield North – Environmental Conservation Areas**

Main Roads has reviewed the information received on 1 October 2020. It is advised, Main Roads has no objection or comments to offer regarding the proposed Metropolitan Region Scheme Amendment 1377/57.

Main Roads requests a copy of the WAPC's final determination to be sent to [planninginfo@mainroads.wa.gov.au](mailto:planninginfo@mainroads.wa.gov.au) quoting the file reference above.

Yours Sincerely

Lindsay Broadhurst  
**Director Road Planning**

Our Ref: PG-STU-035

Your Ref: MRS 1377/57

3 December 2020

Chairman  
Western Australian Planning Commission  
Locked Bag 2506  
PERTH WA 6001

Dear Sir,

**Metropolitan Region Scheme (MRS) Amendment 1377/57 - Forrestfield North Environmental Conservation Areas**

Thank you for the opportunity to comment on MRS Amendment 1377/57, Forrestfield North Conservation Areas. The City has invested significantly in the local structure planning process in the Forrestfield North project area and subsequently ensuring the environmental values within the area are appropriately protected at the highest level through MRS reservation.

The Forrestfield North Residential Precinct Local Structure Plan (LSP), approved by the WAPC on 27 July 2020, identifies portions of land that contain significant biodiversity values as Environmental Conservation. The Strategic Conservation Management Plan and Agreement prepared as supporting documents to the LSP outline the mechanisms to be put in place to enable protection of the environmental values in the area. This includes the reservation of the areas identified as Environmental Conservation under the LSP to be zoned under the MRS as Parks and Recreation.

The City appreciates the level of support and coordination from the relevant State Agencies in facilitating the mechanisms in which the values are to be protected. The City supports the initiation of the MRS Amendment, content of the Amendment Report and recommends the MRS Amendment is progressed as a matter of priority to achieve the intended environmental protection of Environmental Conservation land, to align with the approved Residential Precinct LSP and to provide landowners with greater certainty on the future of their land.

In regards to the portion of land that is proposed to be rezoned from Rural to Urban under the MRS. The City requests a concurrent Local Planning Scheme No. 3 (LSP3) Amendment to rezone this portion of land from Special Rural to Urban Development.

Please note that this is an interim submission provided to meet the advertising close date of 4 December 2020. The City will send the WAPC a Council endorsed submission following the City's Ordinary Council Meeting (OCM) on 22 December 2020. Should you have any queries, please, do not hesitate to contact the City's Senior Strategic Planner, Mr Mitchell Brooks on 9257 9999 or [mitchell.brooks@kalamunda.wa.gov.au](mailto:mitchell.brooks@kalamunda.wa.gov.au).

Regards,

A handwritten signature in black ink, appearing to read 'Chris Lodge', with a stylized flourish extending to the right.

Chris Lodge  
**Principal Strategic Planner**

---

**From:** Mitchell Brooks <Mitchell.Brooks@kalamunda.wa.gov.au>  
**Sent:** Wednesday, 16 December 2020 9:41 AM  
**To:** mrs  
**Cc:** Anthony Muscara; schemes; Peter Varelis  
**Subject:** City of Kalamunda Submission - Metropolitan Region Scheme (MRS) Amendment 1377/57 - Forrestfield North Environmental Conservation Areas  
**Attachments:** Submission Letter - MRS 1377-57 - Environmental Conservation Areas.pdf

Good morning,

Please find the City's Council endorsed submission on MRS Amendment 1377/57 - Forrestfield North Environmental Conservation Areas attached.

Please note that the content of the endorsed submission is different to the interim submission sent on 3 December 2020 and therefore supersedes the interim submission.

At the City's 15 December 2020 Ordinary Council Meeting (OCM) the Council considered the City's officer level submission to the MRS Amendment. Further information was brought forward to Council by landowners who are in negotiations with the Western Australian Planning Commission (WAPC) for the purchase of their land. In the context of the information brought forward, the Council unanimously resolved to:

*That Council REQUEST that the Western Australian Planning Commission (WAPC) DEFER consideration of Metropolitan Region Scheme (MRS) Amendment 1377/57 for a minimum of 6 months for the following reasons:*

- a) Enable those landowners within the amendment area sufficient time to consider information received from the Department of Planning, Lands and Heritage (DPLH) and WAPC in relation to their land.*
- b) Enable those landowners within the amendment area to engage further with the DPLH/WAPC without the prospect of MRS Amendment 1377/57 influencing the timeliness or otherwise of those discussions.*
- c) Enable those landowners within the amendment area to seek their own independent advice prior to MRS Amendment 1377/57 progressing through the consideration and statutory process.*

Should you have any queries, please, do not hesitate to contact me.

Kind Regards,

Mitchell Brooks  
**Senior Strategic Planner**  
T 9257 9938  
[www.kalamunda.wa.gov.au](http://www.kalamunda.wa.gov.au)



T 9257 9999 F 9293 2715

2 Railway Road KALAMUNDA WA 6076

PO Box 42, KALAMUNDA WA 6926



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Our Ref: PG-STU-035

Your Ref: MRS 1377/57

16 December 2020

Chairman  
Western Australian Planning Commission  
Locked Bag 2506  
PERTH WA 6001

Dear Sir,

**Metropolitan Region Scheme (MRS) Amendment 1377/57 - Forreestfield North Environmental Conservation Areas**

Thank you for the opportunity to comment on MRS Amendment 1377/57, Forreestfield North Conservation Areas. The City has invested significantly in the local structure planning process in the Forreestfield North project area and subsequently ensuring the environmental values within the area are appropriately protected at the highest level through MRS reservation.

At the City's 15 December 2020 Ordinary Council Meeting (OCM) the Council considered the City's officer level submission to the MRS Amendment. Further information was brought forward to Council by landowners who are in negotiations with the Western Australian Planning Commission (WAPC) for the purchase of their land. In the context of the information brought forward, the Council unanimously resolved to:

*That Council REQUEST that the Western Australian Planning Commission (WAPC) DEFER consideration of Metropolitan Region Scheme (MRS) Amendment 1377/57 for a minimum of 6 months for the following reasons:*

- a) Enable those landowners within the amendment area sufficient time to consider information received from the Department of Planning, Lands and Heritage (DPLH) and WAPC in relation to their land.*
- b) Enable those landowners within the amendment area to engage further with the DPLH/WAPC without the prospect of MRS Amendment 1377/57 influencing the timeliness or otherwise of those discussions.*



*c) Enable those landowners within the amendment area to seek their own independent advice prior to MRS Amendment 1377/57 progressing through the consideration and statutory process.*

In accordance with Council's resolution, the City respectfully requests that consideration of the MRS Amendment be deferred for a minimum of six months.

Should you have any queries, please, do not hesitate to contact the City's Senior Strategic Planner, Mr Mitchell Brooks on 9257 9999 or [mitchell.brooks@kalamunda.wa.gov.au](mailto:mitchell.brooks@kalamunda.wa.gov.au).

Regards,



Peter Varelis  
Director Development Services



Your ref: 1377/57 & 1378/57  
Our ref: DWERT950 PA037402  
Enquiries: Bree Lyons, Ph 6250 8035

Sam Fagan  
Secretary  
Western Australian Planning Commission  
Lock Bag 2506  
PERTH WA 6001

Via email: [mrs@dplh.wa.gov.au](mailto:mrs@dplh.wa.gov.au)

Dear Sam,

**Metropolitan Region Scheme Amendments – 1377/57 Forrestfield North –  
Environmental Conservation Area – 1378/57 – Lot 71 Chateau Place and Lot 71  
Millhouse Road, Aveyley**

Thank you for providing the above referral for the Department of Water and Environmental Regulation (Department) to consider.

The Department has identified that the proposal has the potential for impact on water values and management. Key issues and recommendations are provided below and these matters should be addressed:

The Department has assessed the District Water Management Strategy's (DWMS) associated with the both the Forrestfield North and – Lot 71 Chateau Place and Lot 71 Millhouse Road, Aveyley Metropolitan Region Scheme Amendments and has provided support for the document. As such the Department is satisfied the developments can proceed to the next planning stage.

If you wish to discuss the matter further, please contact Bree Lyons on 6250 8035 or email [bree.lyons@dwer.wa.gov.au](mailto:bree.lyons@dwer.wa.gov.au).

Yours sincerely,

**Bree Lyons**  
**A/Senior Natural Resource Management Officer**  
**Land Use Planning**  
**Swan Avon Region**

2 December 2020



Your ref : 1377/57 – 833-2-24-66 Pt 1 (RLS/0926)

Our ref : D20/0616588

Enquiries : Sharnie Stuart  
(08) 9264 4046

Ms Sam Fagan  
Secretary  
Western Australian Planning Commission  
Locked Bag 2506  
PERTH WA 6001

Attention: Anthony Muscara  
Principal Planning Officer

Dear Sir/Madam

**Metropolitan Region Scheme Amendment**  
**1377/57 – Forrestfield North – Environmental Conservation Areas**

Thank you for your letter dated 23 September 2020 providing the Department of Education (Department) with the opportunity to comment on the above proposal to amend the Metropolitan Region Scheme (MRS). The Department has prepared a separate response for MRS Amendment No. 1378/57, Lot 71 Chateau Place and Lot 72 Millhouse Road, Aveley (our ref #: D20/0469786).

The Department has reviewed the information submitted in support of the amendment and wishes to make the following comments:

Amendment No. 1377/57

The Department acknowledges that the proposed amendment would facilitate the reservation of Parks and Recreation for conservation purposes and rezone a small portion of Urban area for future Public Open Space. As the amendment would remove the ability for residential development to occur, there would be no impact upon the enrolment capacities of existing public schools within the area. As such, the Department supports the proposed MRS amendment.

Should you have any questions in relation to the above, please do not hesitate to contact Sharnie Stuart, Senior Consultant – Land Planning on (08) 9264 4046 or by email at [sharnie.stuart@education.wa.edu.au](mailto:sharnie.stuart@education.wa.edu.au).

Yours sincerely

Matt Turnbull  
**Manager Land and Property**  
**Asset Planning and Services**

3 November 2020

Section 57 Amendment (Minor)

Form 57

Submission

Metropolitan Region Scheme Amendment 1377/57

Forrestfield North - Environmental Conservation Areas

OFFICE USE ONLY

SUBMISSION NUMBER

13

RLS/0939

To: Secretary  
Western Australian Planning Commission  
Locked Bag 2506  
PERTH WA 6001

Title (Mr, Mrs, Miss, Ms) ..... First Name Peter ..... Lynette .....  
Surname Miles & De Reggi ..... (PLEASE PRINT CLEARLY)  
Address 80 Brae Road High Wycombe Postcode 6057 .....  
Contact phone number 0808958907 ..... Email address l.dereggi@inet.net.au

Submissions may be published as part of the consultation process. Do you wish to have your name removed from your submission?  Yes  No

Submission (Please attach additional pages if required. It is preferred that any additional information be loose rather than bound)

Dotted lines for additional information.


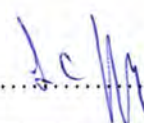
turn over to complete your submission

(Submission continued. Please attach additional pages if required)

You should be aware that:

- The WAPC is subject to the *Freedom of Information Act 1992* and as such, submissions made to the WAPC may be subject to applications for access under the act.
- In the course of the WAPC assessing submissions, or making its report on these submissions, copies of your submission or the substance of that submission, may be disclosed to third parties.

**To be signed by person(s) making the submission**

Signature .....  .....  ..... Date 4-12-2020 .....

**Note: Submissions MUST be received by the advertised closing date, being close of business (5pm) on 4 DECEMBER 2020. Late submissions will NOT be considered.**

Peter and I purchased our property 16 years ago. We did our due diligence with the Shire, now City of Kalamunda, they failed to inform us of the Bush Forever overlay on our property. The seller did not inform us, nor the real estate agent and it is not on our title. We paid full price for our home and property. We would never have purchased our property if we had known it was Bush Forever.

In a meeting we had with a Bush Forever representative, we were informed, the department had failed to check with Land Gate as to who the owners of our property were and all correspondence was addressed to the previous owner of our property.

The area which this MRS Amendment relates to, is known as Forrestfield North which 50 years ago consisted of 2 blocks of 5 acres, one being all bush and one being a combination of bush and a passion fruit/citrus orchard, it was zoned rural, the remaining area was all virgin bush. In the mid 70's, a subdivision approval changed the land zoning to Special Rural to allow for development. Many properties were completely cleared for orchards, small holdings of stock, chickens, horses also homes and sheds, creating hobby farms now referred to and sold as Lifestyle properties. Other properties, as is the case with ours, were partly cleared leaving some natural bush, land now subject to this MRS Amendment.

The area has in the last 16 years been subject to 2 zoning changes, once as an Industrial development and now as an urban/residential development, but regardless of the whether the zoning is Industrial or Residential, our land continues to be deemed Bush Forever/Environmental Conservation. The majority of properties in Forrestfield North are zoned Urban, but not ours, we are rural. Rural land, even though we live 13 kilometres from the CBD, is considered of a lesser value.

There are 17 landowners affected by this MRS Amendment, we average in age from 60 to 90 and should be enjoying our senior years, but we are not due to the planning development of our properties. We are unable to sell our land on the open market, nobody will buy it when it is clouded by the uncertainty of development. Developers certainly won't buy our land as they can not profit from it. This has resulted in extreme stress and caused many health issues, both mentally, physically and financially for us.

When this MRS Amendment is finalised, approximately 50% Peter and my land becomes a Reserve the other remaining 50% will be Public Open Space. Should our land be Bush Forever, no, not 50% of it. Attached is an environmental report, (page 39 refers to our property) commissioned by the City of Kalamunda, it states our land is degraded and should not be Bush Forever other than a very small section. Most of the Bush Forever portion of our land consists of a very denuded chicken run and an olive grove!

The Bush Forever overlay on our property, was deemed by a Government department some twenty years ago. Bush Forever only has a small budget and few staff to administer it. Due to the lack of staff, we have been unable to have our property assessed to see if it still should be Bush Forever. Our property was deemed Bush Forever because of an aerial photo taken some 20 years ago. To the best of our knowledge, a Bush Forever representative has never walked on our property. We recently, at our request, had the department of Bio Diversity walk around our Bush Forever area and they did not find a chicken run or an olive grove to have any conservation value?

In June we received a letter from the WAPC offering to purchase the whole of our land at an agreed value. The WAPC contracted two independent Licensed Valuers from their Board of Valuers to value the whole of our land and home. The valuers were instructed to value our land taking into account the Environmental constraints on the land to be Reserved. This is contrary to the Australian Property Institute's manual. How can it possibly be lawful or right for one government department to deem our land Bush Forever 20 odd years ago and then another department to influence its value for purchase. Attached is a previous submission we made in 2015 regarding our property, we paid a considerable fee for it to be written by an expert in the field. Nothing has changed, except, due to Fire Mitigation requirements from the City of Kalamunda, our land is now more degraded of natural Bush.

Once this MRS Amendment is finalised our land becomes a Reserve, and the WAPC/ State Government is withdrawing their offer to purchase our property as a whole. Attached is the email informing us of this and the reason why.

If we do not sell to the WAPC until after 50% of our land becomes a Reserve, we will have to trigger the MRIF to be purchased. The POS land will then have to be purchased by the City of Kalamunda through the DCP. The City of Kalamunda has stated on many occasions, the POS land will not be required to be purchase before the next 10 to 20 years. Are we really given any real choice in the matter or do the Government hold all the trump cards.

This subdivision has already been going for 16 years, if our land is not required for another 20 years, we will have had our land confiscated/ land banked for 36 years. If Peter and I are still alive, will be 90 and 86 years old, we will be long past an age of being able to maintain 1 hectares of property. Why have our rights to sell our land, when we wish too, been taken away. Where is the legislation that makes this legal, there isn't any. It happens due to a practice legal professionals and many land compensation business call planning blight or legal precedent and quite frankly it is immoral.

Private Landowners suffer significant financial losses and mental anguish when land is confiscated for Environmental reasons. Why should private Landowners who have been the caretakers of the natural bush and endangered flora and fauna on their land,

be impacted so negatively for doing so? Why should a very small number of private Landowners, 17 in our area, fund Reserves for the whole community, it shouldn't! Private landowners should be rewarded financially for taking care of the Environment, if they are not, the desired environmental outcomes the EPA work towards, are increasingly jeopardised.

Most landowners do not understand the complex process of planning or have the financial means to fight planning decisions, unlike the Government who have funds readily available to them. The Government funds, would be far better spent paying private landowners a fair price for Environmental land rather than paying it to legal professionals.

There have been 2 Public Administration Inquiries into Private Property Rights, 15 years apart. The Standing Committee made recommendations for change in both of these Inquiries and yet nothing changes! I have attached the findings.

It is arguable, if it was not for the State's desire to preserve the bush on our land, there is nothing that would stand in the way of our land being zoned urban/residential instead of Environmental Conservation/Bush Forever and we could negotiate a sale in the open market for a fair price rather than being valued under instruction from the WAPC.

We object to this MRS Amendment on the grounds of the percentage of our land it covers and the lose of value which will occur as a result of it.

Sincerely,

Lynette De Reggi and Peter Miles.



Section 57 Amendment (Minor)

Form 57

Submission

Metropolitan Region Scheme Amendment 1377/57

Forrestfield North - Environmental Conservation Areas

OFFICE USE ONLY

SUBMISSION NUMBER

13

RLS/0939

To: Secretary
Western Australian Planning Commission
Locked Bag 2506
PERTH WA 6001

Title (Mr, Mrs, Miss, Ms) First Name Peter Lynette
Surname Miles & De Reggi (PLEASE PRINT CLEARLY)
Address 80 Brae Road High Wycombe Postcode 6057
Contact phone number 0808958907 Email address l.dereggi@inet.net.au

Submissions may be published as part of the consultation process. Do you wish to have your name removed from your submission? [ ] Yes [x] No

Submission (Please attach additional pages if required. It is preferred that any additional information be loose rather than bound)

Dotted lines for additional information input.

turn over to complete your submission


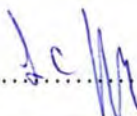
(Submission continued. Please attach additional pages if required)

Dotted lines for additional text input.

You should be aware that:

- The WAPC is subject to the *Freedom of Information Act 1992* and as such, submissions made to the WAPC may be subject to applications for access under the act.
- In the course of the WAPC assessing submissions, or making its report on these submissions, copies of your submission or the substance of that submission, may be disclosed to third parties.

**To be signed by person(s) making the submission**

Signature   Date 4-12-2020

**Note: Submissions MUST be received by the advertised closing date, being close of business (5pm) on 4 DECEMBER 2020. Late submissions will NOT be considered.**

Peter and I purchased our property 16 years ago. We did our due diligence with the Shire, now City of Kalamunda, they failed to inform us of the Bush Forever overlay on our property. The seller did not inform us, nor the real estate agent and it is not on our title. We paid full price for our home and property. We would never have purchased our property if we had known it was Bush Forever.

In a meeting we had with a Bush Forever representative, we were informed, the department had failed to check with Land Gate as to who the owners of our property were and all correspondence was addressed to the previous owner of our property.

The area which this MRS Amendment relates to, is known as Forrestfield North which 50 years ago consisted of 2 blocks of 5 acres, one being all bush and one being a combination of bush and a passion fruit/citrus orchard, it was zoned rural, the remaining area was all virgin bush. In the mid 70's, a subdivision approval changed the land zoning to Special Rural to allow for development. Many properties were completely cleared for orchards, small holdings of stock, chickens, horses also homes and sheds, creating hobby farms now referred to and sold as Lifestyle properties. Other properties, as is the case with ours, were partly cleared leaving some natural bush, land now subject to this MRS Amendment.

The area has in the last 16 years been subject to 2 zoning changes, once as an Industrial development and now as an urban/residential development, but regardless of the whether the zoning is Industrial or Residential, our land continues to be deemed Bush Forever/Environmental Conservation. The majority of properties in Forrestfield North are zoned Urban, but not ours, we are rural. Rural land, even though we live 13 kilometres from the CBD, is considered of a lesser value.

There are 17 landowners affected by this MRS Amendment, we average in age from 60 to 90 and should be enjoying our senior years, but we are not due to the planning development of our properties. We are unable to sell our land on the open market, nobody will buy it when it is clouded by the uncertainty of development. Developers certainly won't buy our land as they can not profit from it. This has resulted in extreme stress and caused many health issues, both mentally, physically and financially for us.

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Sincerely,

Lynette De Reggi and Peter Miles.



intelligent outcomes | respected experience

# Forrestfield North District Structure Plan

## Spring flora and vegetation survey

Prepared for  
Shire of Kalamunda  
by Strategen

March 2016

# **Forrestfield North District Structure Plan**

**Spring flora and vegetation survey**

Strategen is a trading name of  
Strategen Environmental Consultants Pty Ltd  
Level 1, 50 Subiaco Square Road Subiaco WA 6008  
ACN: 056 190 419

March 2016

## ***Limitations***

### **Scope of services**

This report ("the report") has been prepared by Strategen Environmental Consultants Pty Ltd (Strategen) in accordance with the scope of services set out in the contract, or as otherwise agreed, between the Client and Strategen. In some circumstances, a range of factors such as time, budget, access and/or site disturbance constraints may have limited the scope of services. This report is strictly limited to the matters stated in it and is not to be read as extending, by implication, to any other matter in connection with the matters addressed in it.

### **Reliance on data**

In preparing the report, Strategen has relied upon data and other information provided by the Client and other individuals and organisations, most of which are referred to in the report ("the data"). Except as otherwise expressly stated in the report, Strategen has not verified the accuracy or completeness of the data. To the extent that the statements, opinions, facts, information, conclusions and/or recommendations in the report ("conclusions") are based in whole or part on the data, those conclusions are contingent upon the accuracy and completeness of the data. Strategen has also not attempted to determine whether any material matter has been omitted from the data. Strategen will not be liable in relation to incorrect conclusions should any data, information or condition be incorrect or have been concealed, withheld, misrepresented or otherwise not fully disclosed to Strategen. The making of any assumption does not imply that Strategen has made any enquiry to verify the correctness of that assumption.

The report is based on conditions encountered and information received at the time of preparation of this report or the time that site investigations were carried out. Strategen disclaims responsibility for any changes that may have occurred after this time. This report and any legal issues arising from it are governed by and construed in accordance with the law of Western Australia as at the date of this report.

### **Environmental conclusions**

Within the limitations imposed by the scope of services, the preparation of this report has been undertaken and performed in a professional manner, in accordance with generally accepted environmental consulting practices. No other warranty, whether express or implied, is made.

## **Client: Shire of Kalamunda**

Report Version	Revision No.	Purpose	Strategen author/reviewer	Submitted to Client	
				Form	Date
Draft Report	Rev A	For review by Client	D Panickar / D Newsome	Electronic	21 Jan 2016
Final Report	Rev 0	Issued for use	D Panickar / D Newsome	Electronic	27 Jan 2016
<b>Final report</b>	<b>Rev 1</b>	<b>Issued for use</b>	<b>D Panickar / D Newsome</b>	<b>Electronic</b>	<b>4 Mar 2016</b>

Filename: SKA15321\_01 R001 Rev 1 - 4 March 2016



## Table of contents

<b>1. Introduction</b>	<b>1</b>
1.1 Background	1
1.2 Scope	2
<b>2. Context</b>	<b>7</b>
2.1 Legislative context	7
2.1.1 Conservation significant flora and ecological communities	7
2.1.2 Environmentally Sensitive Areas	7
2.1.3 Protection of native vegetation	7
2.1.4 Introduced species	8
2.2 Environmental setting	8
2.2.1 Soils and topography	8
2.2.2 Climate	8
2.2.3 Regional vegetation	9
<b>3. Methods</b>	<b>13</b>
3.1 Desktop assessment	13
3.2 Field assessment	13
3.3 Data analysis and vegetation mapping	14
3.4 Survey limitations and constraints	15
<b>4. Results</b>	<b>17</b>
4.1 Desktop assessment results	17
4.1.1 Threatened and Priority flora	17
4.1.2 Threatened and Priority Ecological Communities	22
4.1.3 Wetlands	25
4.1.4 Bush Forever	25
4.2 Field survey results	25
4.2.1 Native flora	25
4.2.2 Threatened and Priority flora	25
4.2.3 Introduced (exotic) taxa	26
4.2.4 Accumulated species – sites surveyed (species-area curve)	29
4.2.5 Vegetation types	29
4.2.6 Vegetation condition	33
4.3 FCT similarity analysis	34
4.3.1 Threatened and Priority Ecological Communities	37
<b>5. Discussion</b>	<b>38</b>
<b>6. References</b>	<b>41</b>

## List of tables

Table 1: Personnel	13
Table 2: Flora and vegetation survey potential limitations and constraints	16
Table 3: Threatened and Priority flora potentially occurring within the survey area	18
Table 4: Locations of Threatened and Priority flora species recorded within the survey area	25
Table 5: Locations of Declared Plant species pursuant to section 22 of the BAM Act recorded within the survey area	26
Table 6: Vegetation Types	30
Table 7: Area (ha) covered by each VT within the survey area	30
Table 8: Vegetation condition scale (Keighery 1994)	33
Table 9: Area (ha) covered by each vegetation condition category within the survey area	33
Table 10: Comparison between VTs and known FCTs	37
Table 11: Bush Forever values on private lots	39

## List of figures

Figure 1: Regional location	3
Figure 2: The survey area	5
Figure 3: Mean monthly climatic data (temperature and rainfall) for Perth Airport	9
Figure 4: Regional vegetation mapping	11
Figure 5: Location of TECs and PECs within 500 m of the survey area	23
Figure 6: Locations of Declared Plant species pursuant to section 22 of the BAM Act within the survey area	27
Figure 7: Averaged randomised Species Accumulation Curve	29
Figure 8: Vegetation Types (VTs) mapped within the survey area	31
Figure 9: Vegetation condition within the survey area	35

## List of appendices

Appendix 1 Vascular plant taxa recorded by site and vegetation type
Appendix 2 Photographic record of vegetation types
Appendix 3 Desktop assessment results (Parks and Wildlife 2007-, DotE 2015b)
Appendix 4 Conservation significant flora and ecological community definitions
Appendix 5 FCT analysis report

# 1. Introduction

This report presents the findings of a spring flora and vegetation survey undertaken for the strategic planning area known as Forrestfield North in the Shire of Kalamunda (Figure 1).

## 1.1 Background

The Shire of Kalamunda (SoK) has prepared the draft Forrestfield North District Structure Plan (DSP) in response to the State Governments decision to proceed with the Forrestfield Airport Link including the Forrestfield Train Station. The DSP considers the planning land use opportunities surrounding the new station in Forrestfield.

The subject area identified under the DSP consists of four planning precincts:

- Precinct 1 is the area identified for Transit Oriented Development adjacent to the future train station
- Precincts 2 and 3 are in the process of being re-zoned to Urban under the Metropolitan Region Scheme
- Precinct 4 is zoned Industrial Development under the provisions of the Shire's Local Planning Scheme 3 and is currently being developed in accordance with the zone.

The DSP area contains Bush Forever site 45. Landowners within Bush Forever site 45 have suggested that the environmental values associated with their properties are no longer present and the identification of their land as Bush Forever should be removed. The Shire made the commitment to review the environmental values of Bush Forever sites.

An Environmental Review has previously been undertaken for Precincts 2 and 3 and a Foreshore Assessment of Poison Gully Creek to the North. The original Environmental Review was informed by a flora and vegetation assessment; however ten properties within Precincts 2 and 3 were unable to be surveyed. Of the ten properties that were not previously surveyed, approximately seven contain some native vegetation that has not been previously assessed and therefore forms part of the scope of these works.

The survey area comprises the following properties as depicted in Figure 2:

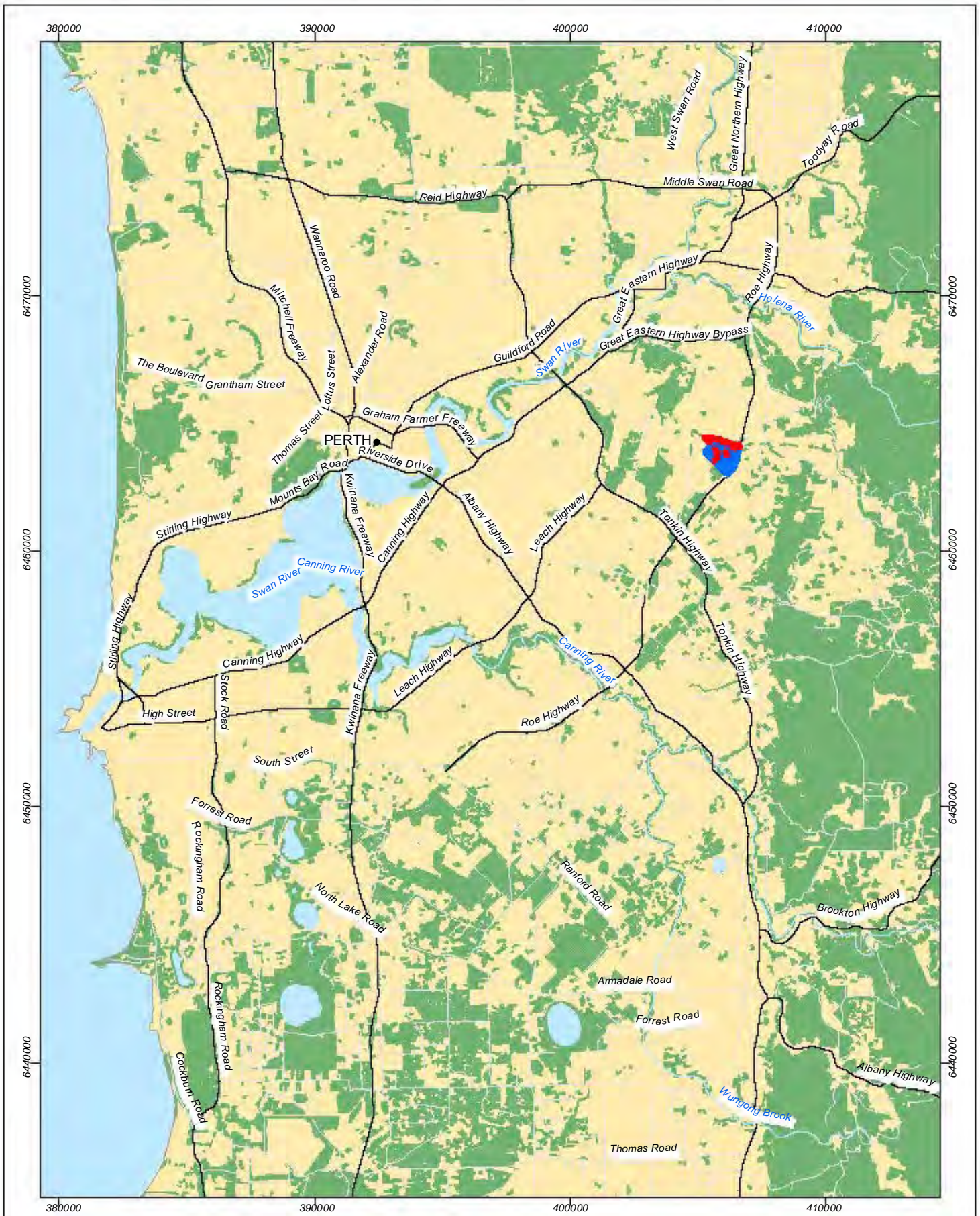
- 15 Raven Street, High Wycombe
- 9 Raven Street, High Wycombe
- 32 and 55 Brae Road, High Wycombe
- 231 Maida Vale Road, High Wycombe
- 15 Milner Road, High Wycombe
- 105 Sultana Road, High Wycombe
- Bush Forever Site 45 (Poison Gully Bushland), which in addition to a number of the lots listed above, contained parts of Lots 80 and 85 Brae Rd.

## 1.2 Scope

The scope of this flora and vegetation survey was to undertake a desktop assessment and field assessment within the survey area.

The objectives were to:

- conduct a desktop survey for Threatened and Priority flora which have been identified as being present in or around the survey area
- collect and identify the vascular plant species present within the survey area
- search areas of suitable habitat for Threatened and/or Priority flora
- define and map the native vegetation communities present within the survey area
- map vegetation condition within the survey area
- provide recommendations on the local and regional significance of the vegetation communities
- prepare a report summarising the findings.



**Figure 1: Regional location**

Scale 1:200,000 at A4



Coordinate System: GDA 1994 MGA Zone 50  
 Note that positional errors may occur in some areas  
 Date: 24/12/2015  
 Author: JCrute  
 Source: Topography: Geoscience Australia 2011.



**Legend**

- Town
- Major road
- Minor road
- Major river
- Lakes
- Native vegetation
- Survey area
- DSP area



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Figure 2: The survey area

Scale 1:7,500 - A3

Meters

Coordinate System: GDA 1994 MGA Zone 50  
 Note that positional errors may occur in some areas  
 Date: 3/03/2016  
 Author: JC/rute  
 Source: Aerial Image: ESRI online, approx. 2012.  
 Path: Q:\Corridor\2015\BKA\BKA153214\Map\_documents\R021\RevA\BKA15321\_01\_R001\_RevA\_F002\_A3.mxd

- Legend**
- Survey area
  - DSP area
  - Bush Forever site 45



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## 2. Context

### 2.1 Legislative context

This biological survey has been conducted with reference to the following Australian and Western Australian legislation:

- *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) – Australian Government
- *Wildlife Conservation Act 1950* (WC Act) – State
- *Environmental Protection Act 1986* (EP Act) – State
- *Biosecurity and Agriculture Management Act 2007* (BAM Act) – State.

#### 2.1.1 Conservation significant flora and ecological communities

Conservation significant flora and ecological communities are determined at a state and federal legislative level. Threatened species are listed under the EPBC Act at the Australian Government level and under the WC Act at the State level (Appendix 4). Priority species are listed by the Department of Parks and Wildlife (Parks and Wildlife) and include species of ‘significant conservation value’ (Appendix 4).

Threatened Ecological Communities (TECs) are listed under both the EPBC Act and EP Act (Appendix 4). Priority Ecological Communities (PECs) are listed by Parks and Wildlife and include species of significant conservation value (Appendix 4).

#### 2.1.2 Environmentally Sensitive Areas

Environmentally Sensitive Areas (ESAs) are protected under the EP Act, and include the following:

- World Heritage areas
- areas included on the National Estate Register
- defined wetlands and associated buffers
- vegetation within 50 m of a listed Threatened species
- TECs.

#### 2.1.3 Protection of native vegetation

Native vegetation is defined under the EP Act as “indigenous aquatic or terrestrial vegetation, and includes dead vegetation unless that dead vegetation is of a class declared by regulation to be excluded from this definition but does not include vegetation in a plantation”.

This definition of native vegetation does not include vegetation that was intentionally sown, planted or propagated unless either of the following applies:

- (a) the vegetation was sown, planted or propagated as required under the EP Act or another written law
- (b) the vegetation is of a class declared by regulation to be included in this definition.

Native vegetation can only be cleared with a clearing permit, unless for some circumstances where exemptions apply pursuant to the EP Act and the Environmental Protection (Clearing of Native Vegetation) Regulations 2004 (the Regulations). Clearing permits issued pursuant to the Regulations may be issued as area permits or purpose permits. Exemptions for clearing under Regulation 5 of the Regulations do not apply within ESAs.

### 2.1.4 Introduced species

The BAM Act provides for management and control of listed organisms, including introduced flora species (weeds). Species listed as declared pests under the BAM Act are classified under three categories:

- C1 Exclusion: Pests assigned under this category are not established in Western Australia, and control measures are to be taken to prevent them entering and establishing in the State
- C2 Eradication: Pests assigned under this category are present in Western Australia in low enough numbers or in sufficiently limited areas that their eradication is still a possibility
- C3 Management: Pests assigned under this category are established in Western Australia, but it is feasible, or desirable, to manage them in order to limit their damage. Control measures can prevent a C3 pest from increasing in population size or density or moving from an area in which it is established into an area that is currently free of that pest.

Under the BAM Act, land managers are required to manage populations of declared pests as outlined under the relevant category.

## 2.2 Environmental setting

### 2.2.1 Soils and topography

The survey area is located within the Swan Coastal Plain 2 (SWA2 – Swan Coastal Plain subregion) of Western Australia (Mitchell *et al.* 2002). The Swan Coastal Plain comprises five major geomorphologic systems that lie parallel to the coast, namely (from west to east) the Quindalup Dunes, Spearwood Dunes, Bassendean Dunes, Pinjarra Plain and Ridge Hill Shelf (Churchward & McArthur 1980; Gibson *et al.* 1994). Each major system is composed of further subdivisions in the form of detailed geomorphologic units (Churchward & McArthur 1980; Semeniuk 1990; Gibson *et al.* 1994). Beard (1990) describes the Swan Coastal Plain as a low-lying coastal plain, often swampy, with sandhills also containing dissected country rising to the duricrusted Dandaragan plateau on Mesozoic, mainly sandy, yellow soils.

### 2.2.2 Climate

The Forrestfield locality experiences a Mediterranean climate characterised by mild, wet winters and warm to hot, dry summers. The nearest Bureau of Meteorology (BoM) weather station at Perth Airport (Station No. 9021) provides average monthly climate statistics for the Forrestfield locality (Figure 3). Average annual rainfall recorded at Perth Airport since 1944 is 769.5 mm (BoM 2015). Rainfall may occur at any time of year; however, most occurs in winter in association with cold fronts from the southwest. Highest temperatures occur between January and March, with average monthly maximums ranging from 29.7°C in March to 32°C in February (BoM 2015). Lowest temperatures occur between June and September, with average monthly minimums ranging from 8°C in July to 9°C in September (BoM 2015).

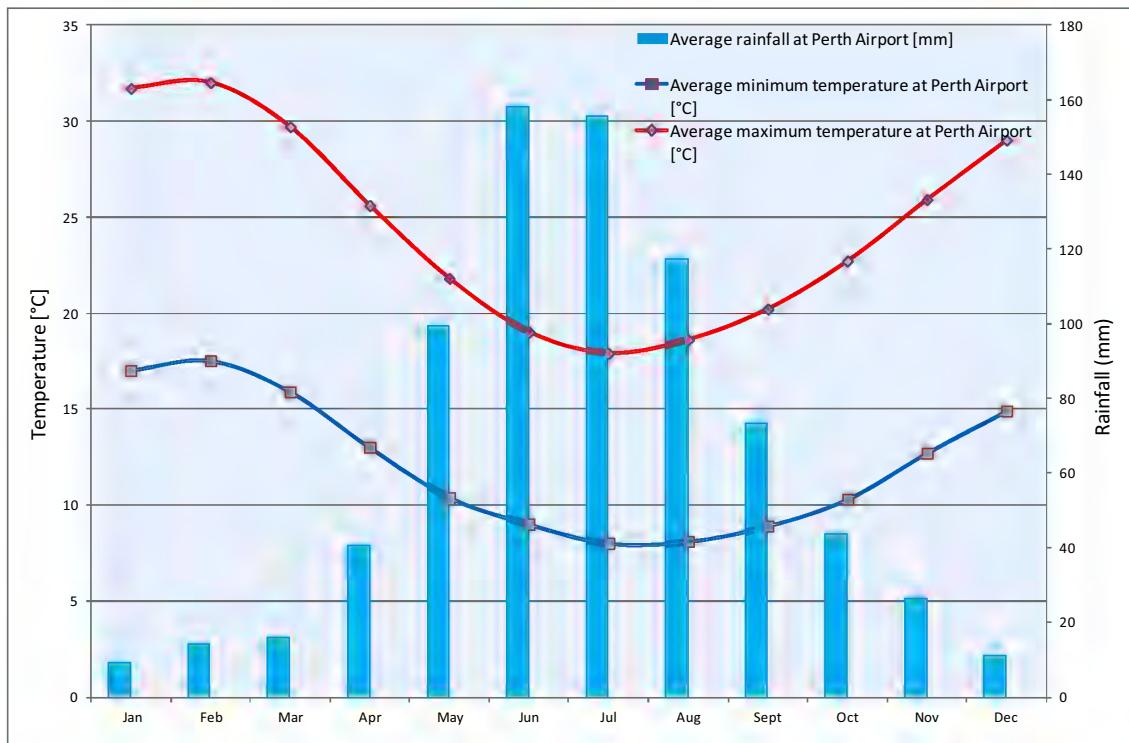


Figure 3: Mean monthly climatic data (temperature and rainfall) for Perth Airport

### 2.2.3 Regional vegetation

Vegetation occurring within the region was initially mapped at a broad scale (1:1 000 000) by Beard during the 1970s. This dataset has formed the basis of several regional mapping systems, including physiographic regions defined by Beard (1981); System 6 Vegetation Complex mapping undertaken by Hedde et al. (1980); the biogeographical region dataset (Interim Biogeographical Regionalisation for Australia, IBRA) for Western Australia (DotE 2015a).

#### *Beard (1990) Botanical Subdistrict*

The survey area occurs within the Drummond Botanical Subdistrict which is characterised by low *Banksia* woodlands on leached sands; *Melaleuca* swamps on poorly-drained depressions; and *Eucalyptus gomphocephala* (Tuart), *Eucalyptus marginata* (Jarrah) and *Corymbia calophylla* (Marri) woodlands on less leached soils (Beard 1990).

#### *IBRA subregion*

IBRA describes a system of 85 'biogeographic regions' (bioregions) and 403 subregions covering the entirety of the Australian continent (Thackway & Cresswell 1995). Bioregions are defined on the basis of climate, geology, landforms, vegetation and fauna.

The survey area occurs within the Swan Coastal Plain 2 IBRA subregion which is dominated by *Banksia* or Tuart on sandy soils, *Casuarina obesa* on outwash plains and paperbark (*Melaleuca*) in swampy areas (Mitchell et al. 2002).

### *System 6 mapping*

System 6 mapping refers to vegetation mapping undertaken at a Vegetation Complex scale by Heddle *et al.* (1980). This is the primary source of information used to calculate potential impacts of proposals to clear native vegetation on the Swan Coastal Plain. The survey area occurs at the interface of the Forrestfield and Southern River vegetation complexes as depicted in Figure 4. These complexes can be described as:

- Forrestfield: vegetation ranges from open forest of *Corymbia calophylla* – *Eucalyptus wandoo* – *E. marginata* to open forest of *E. marginata* – *C. calophylla* – *A. fraseriana* – *Banksia* spp. with fringing woodland of *E. rudis* in the gullies that dissect this landform
- Southern River: open woodland of Marri-Jarrah-banksia on the elevated areas and a fringing woodland of *Eucalyptus rudis*-*Melaleuca raphiophylla* along the streams.

At a finer scale, the survey area falls within the following vegetation system associations as defined in Government of Western Australia (2014) and displayed in Figure 4:

- Bassendean 1001: Medium very sparse woodland; jarrah, with low woodland; banksia & casuarina
- Bassendean 1009: Medium woodland; marri & river gum
- Bassendean 1018: Mosaic: Medium forest; jarrah-marri / Low woodland; banksia / Low forest; teatree / Low woodland; *Casuarina obesa*
- Bassendean 3: Medium forest; jarrah-marri.

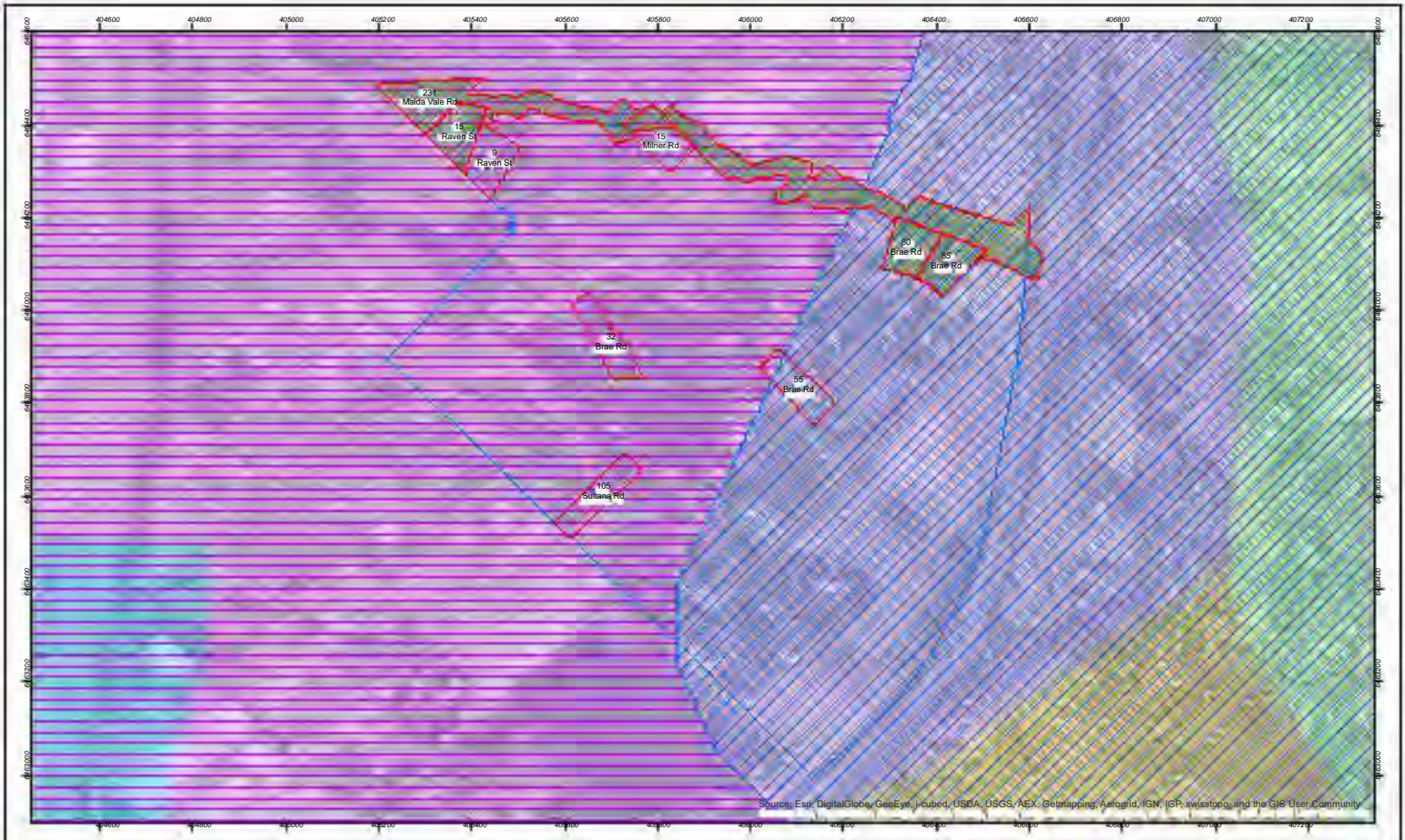


Figure 4: Regional vegetation mapping

Scale: 1:7,500 -> Meters

Coordinate System: GDA 1994 MGA Zone 50  
 Note that positional errors may occur in some areas  
 Date: 3/03/2018  
 Author: JCrute  
 Source: Aerial image: ESRI online, approx. 2012. Vegetation Beard: DAFWA, 2014. Vegetation Heddle et al: DEC 2012.  
 Path: Q:\Corwall\2015\BASSA\BASSA153214\Map\_documents\2017\Reval\BASSA15321\_01\_R001\_Reval\_F004\_A3.mxd

Legend		Vegetation class (Heddle et al)		System association (Beard)	
	Survey area		Forrestfield complex		BASSENDAN_1001
	Bush Forever site 45		Southern River complex		BASSENDAN_1009
	DSP area				BASSENDAN_1018
					BASSENDAN_3

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## 3. Methods

### 3.1 Desktop assessment

A desktop assessment was conducted using Florabase, Parks and Wildlife, and Department of the Environment (DotE) databases to identify the possible occurrence of TECs, PECs and Threatened and Priority flora potentially occurring within the survey area. Reports that document regional flora, vegetation and fauna within the surrounds of the survey area were also reviewed prior to the field assessment.

A database search request was also submitted to the Threatened Communities Branch of Parks and Wildlife to identify any potential TECs or PECs within 5 km of the survey area.

### 3.2 Field assessment

The field survey was conducted according to standards set out in Guidance Statement 51 (EPA 2004). The assessment of flora and vegetation within the survey area was undertaken by two ecologists from Strategen over the course of two days between 19-20 October 2015. Table 1 identifies staff involved in the field surveys, their role and qualifications. The survey area was traversed on foot to record changes in vegetation structure and type and eight vegetation quadrats were surveyed to identify vegetation types (Appendix 1; Appendix 2).

Table 1: Personnel

Name	Role	Flora collection permit
Mr. D. Panickar Strategen (Senior Ecologist)	Planning, fieldwork, plant identification, data interpretation and report preparation	SL010993
Ms. C. Courtauld Strategen (Ecologist)	Planning, fieldwork, plant identification, data interpretation and report preparation	SL011638

Site selection for vegetation mapping was based on differences in structure and species composition of the communities present within the survey area. Vegetation mapping sites were determined from aerial photographs. The survey area was traversed on foot, allowing for opportunistic sites to be placed where a change in vegetation structure or composition was observed.

Flora and vegetation was described and sampled systematically at each quadrat and additional opportunistic collecting was undertaken wherever previously unrecorded plants were observed. At each site the following floristic and environmental parameters were noted:

- GPS location
- topography
- soil type and colour
- outcropping rocks and their type
- percentage cover and average height of each vegetation stratum.

For each vascular plant species, the average height, number of plants and percent cover were recorded.

All plant specimens collected during the field surveys were identified using appropriate reference material or through comparisons with pressed specimens housed at the Western Australian Herbarium where necessary. Nomenclature of the species recorded is in accordance with Western Australian Herbarium (1998).

### 3.3 Data analysis and vegetation mapping

Due to the mostly degraded nature and uniform distribution of vegetation within the survey area; quadrat data were grouped into a species by site matrix to delineate individual vegetation types (VTs) present within the survey area. Aerial photography interpretation and field notes taken during the survey were then used to develop VT mapping polygon boundaries over the survey area. These polygon boundaries were then digitised using Geographic Information System (GIS) software.

VT descriptions (though floristic in origin) have been adapted from the National Vegetation Information System (NVIS) Australian Vegetation Attribute Manual Version 6.0 (ESCAVI 2003), a system of describing structural vegetation units (based on dominant taxa). This model follows nationally-agreed guidelines to describe and represent vegetation types, so that comparable and consistent data is produced nation-wide. For the purposes of this report, a VT is considered equivalent to a NVIS sub-association as described in ESCAVI (2003).

Vegetation condition was recorded at all quadrats, and also opportunistically within the survey area during the field assessment where required. Vegetation condition was described using the vegetation condition scale for the South West Botanical Province (Keighery 1994). Vegetation condition polygon boundaries were developed using this information in conjunction with aerial photography interpretation, and were digitised as for vegetation type mapping polygon boundaries.

To identify possible TECs and PECs in the survey area, vegetation quadrats (and subsequently, Vegetation Types) were compared to Floristic Community Types (FCTs) defined by Gibson *et al.* (1994). At present, there is no single consistent method for the determination of FCTs for vegetation data in the Swan Coastal Plain. Therefore, three different multivariate analyses were used to analyse the data collected from the survey area, the results of which were compared to determine the most likely result. This approach is consistent with the requirements of the Department of Parks and Wildlife. These analyses were undertaken by Dr. Shane Chalwell of Plantecology and comprised the following:

- hierarchical clustering
- nearest neighbour
- non-hierarchical clustering.

Hierarchical agglomerative clustering is the usual first stage in classifying vegetation data into community types. This involves calculating the similarity (or more often, the dissimilarity) between plots within the dataset and then sequentially fusing the plots into groups according to their similarity.

Nearest neighbour analysis involves calculating a similarity or dissimilarity matrix for the combined new dataset and simply allocating each new plot to the FCT of the plot from the original dataset that shares the greatest similarity.

Non-hierarchical clustering methods often allow new plot data to be added to previous classifications because they are based on the concept that each group or cluster is represented by a prototype (i.e. a 'type' plot) (Plantecology 2015). Therefore, new observations can be assigned to an existing classification by calculating the distance to the nearest prototype (which may be considered a membership criterion).

Each method of analysis has its own merits and disadvantages, which is why results should be viewed in comparison with each other and combined with site knowledge to determine the most likely outcome. A copy of the analyses undertaken by Plantecology (2015) is provided in Appendix 5.

The degraded nature of some sites within the survey area coupled with the broad nature of FCTs lead many vegetation types to characterise admixtures and transition zones between FCTs. In addition, the survey area was mapped based on extrapolated quadrat data from a single flora assessment, rather than accumulated species data over successive seasons within known vegetation community types as per Gibson *et al.* (1994). Consequently, assigned FCTs within the survey area are inferred and not absolute; i.e. a vegetation code assigned to an FCT is inferred to resemble floristic aspects of that FCT as defined by Gibson *et al.* (1994).



An averaged randomised Species Accumulation Curve, based on accumulated species compared against sites surveyed was used to provide an indication as to the level of adequacy of the survey effort. As the number of survey sites, and correspondingly the size of the area surveyed increases, there should be a diminishing number of new species recorded. At some point, the number of new species recorded becomes essentially asymptotic. As the number of new species being recorded for survey effort expended approaches this asymptotic value, the survey effort can be considered to be adequate.

### **3.4 Survey limitations and constraints**

Table 2 displays the evaluation of the flora and vegetation assessment against a range of potential limitations that may have an effect on that assessment. Based on this evaluation, the assessment has not been subject to constraints that would affect the thoroughness of the assessment and the conclusions reached.

Table 2: Flora and vegetation survey potential limitations and constraints

Potential limitation	Impact on assessment	Comment
Sources of information and availability of contextual information (i.e. pre-existing background versus new material).	<b>Not a constraint.</b>	The survey has been undertaken in the Drummond Botanical Subdistrict on the Swan Coastal Plain which has been well studied and documented with ample literature available (Beard 1990).
Scope (i.e. what life forms, etc., were sampled).	<b>Not a constraint.</b>	Due to the degraded nature and uniform distribution of vegetation within the survey area and timing of the survey (i.e. spring); most life forms are likely to have been sampled adequately during the time of the survey.
Proportion of flora/fauna collected and identified (based on sampling, timing and intensity).	<b>Not a constraint.</b>	The proportion of flora surveyed was adequate. The entire survey area was traversed and flora species were recorded systematically.
Completeness and further work which might be needed (i.e. was the relevant survey area fully surveyed).	<b>Not a constraint</b>	The information collected during the survey was sufficient to assess the vegetation that was present during the time of the survey.
Mapping reliability.	<b>Not a constraint.</b>	Aerial photography of a suitable scale was used to map the survey area and identify potential fauna habitat. Sites were chosen from these aerials to reflect changes in community structure. Opportunistic sites were also used if differences were observed during on ground reconnaissance. Vegetation types were assigned to each site based on topography, soil type and presence/absence and percent foliage cover of vegetation.
Timing, weather, season, cycle.	<b>Not a constraint.</b>	Flora and vegetation surveys are normally conducted following winter rainfall in the South-West Province, ideally during spring (EPA 2004). The field assessment was conducted in October (i.e. spring) in fine weather conditions and therefore these factors are not deemed to be constraints.
Disturbances (fire flood, accidental human intervention, etc.).	<b>Not a constraint.</b>	The survey area and regional surrounds have been subject to disturbance over a significant period of time. Given the wide range of this disturbance, this is not considered to be a limitation within the survey area.
Intensity (in retrospect, was the intensity adequate).	<b>Not a constraint.</b>	The survey area was traversed on foot and all differences in vegetation structure were recorded appropriately.
Resources (i.e. were there adequate resources to complete the survey to the required standard).	<b>Not a constraint.</b>	The available resources were adequate to complete the survey.
Access problems (i.e. ability to access survey area).	<b>Not a constraint.</b>	Existing tracks enabled adequate access to survey the vegetation and fauna within the survey area. Where access was not available by car, the area was easily traversed by foot.
Experience levels (e.g. degree of expertise in species identification to taxon level).	<b>Not a constraint.</b>	All survey personnel have the appropriate training in sampling and identifying the flora of the region.

## 4. Results

### 4.1 Desktop assessment results

A total of 764 native vascular plant taxa from 79 plant families have the potential to occur within the survey area (Parks and Wildlife 2007-; DotE 2015b).

#### 4.1.1 Threatened and Priority flora

A desktop survey for Threatened and Priority flora that may potentially occur within the survey area was undertaken using NatureMap (Parks and Wildlife 2007-), the Western Australian Herbarium (Western Australian Herbarium 1998-), and the DotE Protected Matters Search Tool (DotE 2015c).

Flora within Western Australia that is considered to be under threat may be classed as either Threatened flora or Priority flora. Where flora has been gazetted as Threatened flora under the WC Act, the taking of such flora without the written consent of the Minister is an offence. The WC Act defines “to take” flora as to gather, pluck, cut, pull up, destroy, dig up, remove or injure the flora or to cause or permit the same to be done by any means. Parks and Wildlife (2014) contains the current list of Threatened flora in Western Australia.

Priority flora are considered to be species which are potentially under threat, but for which there is insufficient information available concerning their distribution and/or populations to make a proper evaluation of their conservation status. Parks and Wildlife categorises Priority flora according to their conservation priority using five categories, P1 (highest conservation significance) to P5 (lowest conservation significance), to denote the conservation priority status of such species. Priority flora species are regularly reviewed and may have their priority status changed when more information on the species becomes available. Appendix 4 defines levels of Threatened and Priority flora (Western Australian Herbarium 1998-).

At the national level, the EPBC Act lists Threatened species as extinct, extinct in the wild, critically endangered, endangered, vulnerable, or conservation dependent. Appendix 4 defines each of these categories of Threatened species. The EPBC Act prohibits an action that has or will have a significant impact on a listed Threatened species without approval from the Australian Government Minister for the Environment. The current EPBC Act list of Threatened flora may be found on the DotE (2015c) website.

Table 3 shows the Threatened flora potentially occurring within the survey area. The desktop assessment identified 30 Threatened flora and 26 Priority flora species that have the potential to occur within the survey area. Due to the large number of conservation significant flora species identified in the desktop surveys; only Threatened flora have been formally listed within Table 3. Habitat requirements for all Priority flora species identified in the desktop assessment were included within the field survey however. Refer to Appendix 3 for a full list of Threatened and Priority flora species identified within 5 km of the survey area.

Of these, based on specific habitat requirements, 14 Threatened flora species were considered to have the potential to occur (Table 3).

Table 3: Threatened and Priority flora potentially occurring within the survey area

Species	Conservation status		Description	Potential to occur
	EPBC Act	WC Act		
<i>Calectasia cyanea</i>	<b>Threatened</b> – Critically Endangered	Threatened	A rhizomatous, clump forming perennial, herb from 10 to 60 cm tall. Flowers are blue/purple and visible from June to October. Habitat for this species occurs in heathland on flat to gentle slopes on white, grey or yellow sand and gravel (Western Australian Herbarium 1998-, DotE 2015d).	<b>Possible</b> – Preferred soil type/habitat occurs within the survey area.
<i>Darwinia foetida</i>	<b>Threatened</b> – Critically Endangered	Threatened	An erect, spreading shrub to 70 cm tall. Green flowers, visible from October to November. Habitat for this species occurs within wet/winter-damp clay under Myrtaceous shrubland and is restricted to the Muchea area (DotE 2015d).	<b>Unlikely</b> – The survey area occurs outside of the known range of the species.
<i>Ptilotus pyramidatus</i>	<b>Threatened</b> – Critically Endangered	Threatened	A small, perennial herb to 5 cm tall. The erect stem is tufted, unbranched, finely striated, hairy and greyish in colour. Flowers are a greenish-yellow colour and arranged in dense, pyramid-shaped spikes about 2.5 cm long (DotE 2014d). Habitat for this species occurs in seasonally inundated flats (floodplains) in patchy <i>Melaleuca acutifolia</i> open scrub over <i>Verticordia plumosa</i> var. <i>brachyphylla</i> and <i>Hypocalymma angustifolium</i> open heath over <i>Meeboldina cana</i> – <i>Lepironia neesii</i> open rushes and sedges and mid-dense, species-rich native annual herbs and geophytes (DotE 2015d).	<b>Unlikely</b> – Preferred soil type/habitat does not occur within the survey area.
<i>Synaphea</i> sp. Fairbridge Farm (D. Papenfus 696)	<b>Threatened</b> – Critically Endangered	Threatened	A dense, clumped shrub from 25 to 65 cm tall. Flowers are erect axillary spikes, yellow in colour, hairy, openly spaced and are angled upwards in the spike (DotE 2015d). Habitat for this species occurs on the Pinjarra Plain, south of Perth from Serpentine to Dardanup. The five known subpopulations of the species are fragmented and exist within scattered patches of remnant vegetation, in areas which have been extensively cleared for agriculture (DotE 2015d).	<b>Unlikely</b> – The survey area occurs outside of the known range of the species.
<i>Andersonia gracilis</i>	<b>Threatened</b> – Endangered	Threatened	A slender shrub to 50 cm tall with few, spreading branches. Flowers are pink to pale mauve. Habitat for this species occurs within seasonally damp, black sandy clay flats near swamps (Western Australian Herbarium 1998-; DotE 2015d).	<b>Unlikely</b> – Preferred soil type/habitat does not occur within the survey area.
<i>Banksia mimica</i>	<b>Threatened</b> – Endangered	Threatened	A prostrate, rhizomatous shrub with underground stems and leaves up to 41 cm long. Flowers are yellow-brown and visible from December to February (Western Australian Herbarium 1998-; DotE 2015d). Habitat for this species occurs in three disjunct populations at Mogumber in the north, the Darling Range east of Perth and the Whicher Range, south-east of Busselton on flat to gentle slopes on grey and white sand in open <i>Banksia</i> woodlands (DotE 2015d).	<b>Unlikely</b> – The survey area occurs outside of the known range of the species.
<i>Caladenia huegeli</i>	<b>Threatened</b> – Endangered	Threatened	A slender orchid from 30 to 50 cm tall. One or two striking flowers characterised by a greenish-cream lower petal with a maroon tip. Other petals are cream with red or pink suffusions. Habitat for this species occurs within well-drained, deep sandy soils in low mixed <i>Banksia</i> , <i>Allocasuarina</i> and Jarrah woodlands (Western Australian Herbarium 1998-, DotE 2015d).	<b>Possible</b> – Preferred soil type/habitat occurs within the survey area.

Species	Conservation status		Description	Potential to occur
	EPBC Act	WC Act		
<i>Calytrix breviseta</i> subsp. <i>breviseta</i>	<b>Threatened</b> – Endangered	Threatened	A slender orchid to 45 cm tall. Unusually flattened flowers, marked with brown blotches on their under surface. Habitat for this species occurs in areas subject to winter inundation within dense heath with scattered Myrtaceous trees (DotE 2015d).	<b>Possible</b> – Preferred soil type/habitat occurs within the survey area.
<i>Chamelaucium</i> sp. Gingin (N.G. Marchant 6)	<b>Threatened</b> – Endangered	Threatened	An open straggly shrub from 1 to 2 m tall. Flowers are pale pinkish-white, and the buds are tinged a deeper pink. Habitat for this species is confined to the Gingin/Chittering area, where it has a range of only 3 km (DotE 2015d).	<b>Unlikely</b> – The survey area occurs outside of the known range of the species.
<i>Darwinia apiculata</i>	<b>Threatened</b> – Endangered	Threatened	A densely branched, rounded shrub from 40 to 50 cm tall with red, slender young branchlets. Flowers are green & yellow/red and visible in October. Habitat for this species occurs in open Jarrah-Marri woodland on shallow, gravelly soil over laterite, open heathland over sandy loams with granite boulders and hilltops and slopes, in red clay or gravel soils (Western Australian Herbarium 1998-, DotE 2015d).	<b>Possible</b> – Preferred soil type/habitat occurs within the survey area.
<i>Diuris purdiei</i>	<b>Threatened</b> – Endangered	Threatened	A slender orchid to 45 cm tall. Unusually flattened flowers, marked with brown blotches on their under surface. Habitat for this species occurs in areas subject to winter inundation within dense heath with scattered Myrtaceous trees (DotE 2015d).	<b>Unlikely</b> – Preferred soil type/habitat does not occur within the survey area.
<i>Drakaea elastica</i>	<b>Threatened</b> – Endangered	Threatened	A slender orchid to 30 cm tall with a prostrate, round to heart shaped leaf. Singular, bright green, glossy flower. Habitat for this species is within bare patches of white sand over dark sandy loams on damp areas mostly in <i>Kunzea glabrescens</i> thickets (DotE 2015d).	<b>Unlikely</b> – Preferred soil type/habitat does not occur within the survey area.
<i>Eucalyptus balanites</i>	<b>Threatened</b> – Endangered	Threatened	A mallee to 5 m tall. Bark is rough and flaky. Flowers are white and visible October to December, or from January to February (Western Australian Herbarium 1998-). Habitat for this species is sandy soils with lateritic gravel in two disjunct populations in Badgingarra and the City of Armadale (DotE 2015d).	<b>Unlikely</b> – The survey area occurs outside of the known range of the species.
<i>Grevillea curviloba</i> subsp. <i>incurva</i>	<b>Threatened</b> – Endangered	Threatened	A prostrate to erect shrub from 0.1 m to 2.5 m tall. Flowers are white-cream and visible from August to September. Habitat for this species is sand and sandy loam substrates in winter-wet heath (Western Australian Herbarium 1998-).	<b>Possible</b> – Preferred soil type/habitat occurs within the survey area.
<i>Lasiopetalum pterocarpum</i>	<b>Threatened</b> – Endangered	Threatened	An open, multi-stemmed shrub to 1.2 m tall. Flowers are pink and visible from August to December. Habitat for this species occurs in dark red-brown loam or clayey sand over granite on sloping banks near creeklines (Western Australian Herbarium 1998-).	<b>Possible</b> – Preferred soil type/habitat occurs within the survey area.
<i>Lepidosperma rostratum</i>	<b>Threatened</b> – Endangered	Threatened	A rhizomatous sedge to 30 cm in diameter. Stems are circular in cross section and flowers are spike-like and up to 4 cm long. Habitat for this species occurs in sandy soils among low heath comprised of <i>Banksia telmatiaea</i> and <i>Calothamnus hirsutus</i> in winter-wet swamps (Western Australian Herbarium 1998-, DotE 2015d).	<b>Unlikely</b> – Preferred soil type/habitat does not occur within the survey area.

Species	Conservation status		Description	Potential to occur
	EPBC Act	WC Act		
<i>Macarthuria keigheryi</i>	<b>Threatened</b> – Endangered	Threatened	An erect or spreading perennial herb or shrub from 20 to 40 cm tall. Flowers are visible from September to March. Habitat for this species occurs on white or grey sand in low-lying, winter-wet areas among heathland and jarrah- <i>Banksia</i> woodland (Western Australian Herbarium 1998-, DotE 2015d).	<b>Possible</b> – Preferred soil type/habitat occurs within the survey area.
<i>Synaphea stenoloba</i>	<b>Threatened</b> – Endangered	Threatened	A caespitose shrub from 30 to 45 cm tall. Flowers are yellow and visible from August to October. Habitat for this species occurs on sandy or sandy clay soils in winter-wet flats or on granite (Western Australian Herbarium 1998-, DotE 2015d).	<b>Possible</b> – Preferred soil type/habitat occurs within the survey area.
<i>Thelymitra dedmaniarum</i>	<b>Threatened</b> – Endangered	Threatened	A tuberous, perennial orchid to 80 cm tall. Flowers yellow and visible from November to January. Habitat for this species is in open Wandoo woodland on red-brown sandy loam on granite (Western Australian Herbarium 1998-, DotE 2015d).	<b>Unlikely</b> – Preferred soil type/habitat does not occur within the survey area.
<i>Thelymitra stellata</i>	<b>Threatened</b> – Endangered	Threatened	A tuberous, terrestrial orchid to 25 cm tall. Flowers are yellow and brown and visible from October to November. Habitat for this species is low heath and scrub in Jarrah and Wandoo woodland; on ridges, slopes, flats, riverbanks and breakaways (Western Australian Herbarium 1998-, DotE 2015d).	<b>Possible</b> – Preferred soil type/habitat occurs within the survey area.
<i>Trithuria occidentalis</i>	<b>Threatened</b> – Endangered	Threatened	Sokoloff et al. (2008) describes <i>Trithuria occidentalis</i> as having fruits with a maximum width in their distal part; dry mature fruits that dehisce by separating three longitudinal ribs; dry mature seeds clearly sculptured. Habitat for this species is within very open shrubland of <i>Melaleuca lateritia</i> , partly submerged on the edge of shallow, winter - wet claypans. <i>Trithuria occidentalis</i> is currently known from one confirmed location near Ellenbrook. There is also a possible second location in Upper Swan in which the species has not been recorded since 1978 (Sokoloff et al. 2008).	<b>Unlikely</b> – The survey area occurs outside of the known range of the species.
<i>Acacia anomala</i>	<b>Threatened</b> – Vulnerable	Threatened	A slender, rush-like shrub from 20 to 50 cm tall. Flowers are yellow and visible from August to September. Habitat for this species occurs in low open woodland or forest dominated by <i>Eucalyptus marginata</i> , <i>E. wandoo</i> , <i>E. accedens</i> and <i>Corymbia calophylla</i> on laterite in shallow sand, loam, clay or gravel (Western Australian Herbarium 1998-, DotE 2015d).	<b>Possible</b> – Preferred soil type/habitat occurs within the survey area.
<i>Acacia aphylla</i>	<b>Threatened</b> – Vulnerable	Threatened	A divaricately branched, spinescent, glaucous shrub from 0.9 to 2.5 m tall. Flowers are yellow and visible from August to October. Habitat for this species occurs in open forest dominated by <i>Eucalyptus marginata</i> and <i>Corymbia calophylla</i> , or woodland dominated by <i>E. loxophleba</i> associated with laterite and granite outcrops on hillsides (Western Australian Herbarium 1998-, DotE 2015d).	<b>Unlikely</b> – Preferred soil type/habitat does not occur within the survey area.
<i>Anigozanthos viridis</i> subsp. <i>terraspectans</i>	<b>Threatened</b> – Vulnerable	Threatened	Rhizomatous perennial herb from 5 to 20 cm tall. Flowers are green/yellow-green and visible from August to September. Habitat for this species is grey sand and clay loam substrate in winter-wet depressions (Western Australian Herbarium 1998-).	<b>Possible</b> – Preferred soil type/habitat occurs within the survey area.

Species	Conservation status		Description	Potential to occur
	EPBC Act	WC Act		
<i>Anthocercis gracilis</i>	<b>Threatened</b> – Vulnerable	Threatened	An erect, spindly shrub to 1 m tall. Flowers are yellow-green and visible from September to October. Habitat for this species occurs on sandy or loamy soils associated with granite outcrops (Western Australian Herbarium 1998-).	<b>Unlikely</b> – Preferred soil type/habitat does not occur within the survey area.
<i>Conospermum undulatum</i>	<b>Threatened</b> – Vulnerable	Threatened	An erect compact shrub from 0.6 to 2.0 m high. Flowers are white and visible May to October. Habitat for this species is grey or yellow-orange clayey substrate (Western Australian Herbarium 1998-).	<b>Possible</b> – Preferred soil type/habitat occurs within the survey area.
<i>Diuris drummondii</i>	<b>Threatened</b> – Vulnerable	Threatened	A tuberous orchid to from 0.5 to 1.05 m tall. Flowers are yellow and visible from November to January. Habitat for this species occurs in low-lying depressions or swamps (Western Australian Herbarium 1998-).	<b>Unlikely</b> – Preferred soil type/habitat does not occur within the survey area.
<i>Diuris micrantha</i>	<b>Threatened</b> – Vulnerable	Threatened	A slender orchid to 60 cm tall. Flowers are yellow with reddish-brown markings and visible from September to October. Habitat for this species occurs within clay-loam substrates in winter-wet depressions or swamps (DotE 2015d).	<b>Unlikely</b> – Preferred soil type/habitat does not occur within the survey area.
<i>Drakaea micrantha</i>	<b>Threatened</b> – Vulnerable	Threatened	A tuberous, terrestrial orchid to 30 cm tall. The species can be identified by its silvery-grey heart shaped leaf with prominent green veins. The species produces a singular red and yellow flower. Habitat for this species occurs within cleared, open sandy patches (Brown <i>et al.</i> 1998).	<b>Possible</b> – Preferred soil type/habitat occurs within the survey area.
<i>Eleocharis keigheryi</i>	<b>Threatened</b> – Vulnerable	Threatened	A rhizomatous, clumped perennial grass-like herb to 40 cm tall. Flowers are green and visible from August to November. Habitat for this species occurs in clay or sandy loam in freshwater creeks and claypans (Western Australian Herbarium 1998-).	<b>Possible</b> – Preferred soil type/habitat occurs within the survey area.

#### 4.1.2 Threatened and Priority Ecological Communities

A TEC is defined under the EP Act as an ecological community listed, designated or declared under a written law or a law of the Australian Government as Threatened, Endangered or Vulnerable. There are four State categories of TECs (DEC 2010)<sup>1</sup>:

- presumed totally destroyed (PD)
- critically endangered (CR)
- endangered (EN)
- vulnerable (VU).

A description of each of these TEC categories is presented in Appendix 4. TECs are gazetted as such (Parks and Wildlife 2015a) and some Western Australian TECs are listed as Threatened under the EPBC Act.

Under the EPBC Act, a person must not undertake an action that has or will have a significant impact on a listed TEC without approval from the Australian Government Minister for the Environment, unless those actions are not prohibited under the EPBC Act. A description of each of these categories of TECs is presented in Appendix 4. The current EPBC Act list of TECs can be located on the DoE (2015b) website.

Ecological communities identified as Threatened, but not listed as TECs, are classified as Priority Ecological Communities (PECs). These communities are under threat, but there is insufficient information available concerning their distribution to make a proper evaluation of their conservation status. Parks and Wildlife categorises PECs according to their conservation priority, using five categories, P1 (highest conservation significance) to P5 (lowest conservation significance), to denote the conservation priority status of such ecological communities. Appendix 4 defines PECs (DEC 2010). A list of current PECs can be viewed at the Parks and Wildlife (2015b) website.

Five TECs were identified as occurring within 500 m of the DSP area as displayed Figure 5 and listed below:

- SCP 20a (TEC listed under the WC Act)
- SCP 20b (TEC listed under the WC Act)
- SCP 3a (TEC listed under the EPBC Act)
- SCP 3b (TEC listed under the WC Act)
- SCP 20c (TEC listed under the EPBC Act).

An additional three TECs and one PEC were identified within a 5 km radius of the DSP area as listed below:

- SCP 07 (TEC listed under the EPBC Act)
- SCP 02 (TEC listed under the WC Act)
- SCP 3c (TEC listed under the EPBC Act)
- Central Northern Darling Scarp Granite Shrubland Community (Priority 4 PEC).

Mapped boundaries of TECs and PECs do not necessarily represent the actual extent of their respective communities and are rather a broad scale indication of where the communities have been previously mapped plus an additional buffer. Figure 5 displays the boundaries of SCP 20a, SCP 3a, SCP 3b and SCP 20c occurring within the all lots within the survey area.

<sup>1</sup>The Department of Environment and Conservation is still listed as the author of all TEC and PEC databases and have been referred to as such in this document instead of the Department of Parks and Wildlife (Parks and Wildlife).






Figure 5: Location of TECs and PECs within 500 m of the survey area

Scale: 1:12,500 - 1:100

Coordinate System: GDA 1994 MGA Zone 50  
 Note that positional errors may occur in some areas  
 Date: 3/03/2018  
 Author: JCrute  
 Source: Aerial image: ESRI online, approx. 2012. TEC/PEC: DPAW 2015.  
 Plan: G:\Corwall\2015\BMA\BMA\15214\Map\_documents\F011\Rev4\BMA1521\_01\_R001\_Rev4\_F05\_A3.mxd

**Legend**

Survey area	500m buffer (TEC EPBC Act)	TEC (WC Act)
Bush Forever site 45	SCP3a	SCP3b
DSP area	SCP20c	SCP20a
		SCP20b



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### 4.1.3 Wetlands

A search of the *Geomorphic Wetlands of the Swan Coastal Plain Database* shows that the northern extent of the DSP area, including a portion of Poison Gully Creek is classified as a Palusplain Resource Enhancement (RE) wetland, (UFI 15880) (Landgate 2015).

### 4.1.4 Bush Forever

Bush Forever Site 45 (Poison Gully Bushland, High Wycombe) occurs within the northern portion of the DSP area. This Bush Forever Site is associated with Poison Gully Creek and vegetation on private lots adjacent to the creek.

## 4.2 Field survey results

### 4.2.1 Native flora

A total of 62 native vascular plant taxa from 43 plant genera and 21 plant families were recorded within the survey area. The majority of taxa were recorded within the Fabaceae (11 taxa) and Proteaceae (11 taxa) families (Appendix 1).

### 4.2.2 Threatened and Priority flora

No Threatened or Priority flora species pursuant to Schedule 1 of the WC Act and as listed by section 178 of the EPBC Act, Parks and Wildlife (2014) and Western Australian Herbarium (1998-) were recorded within the survey area. One Threatened flora species, *Conospermum undulatum* was previously recorded within Lot 231 of the survey area; however was not observed during this survey. Table 4 displays the previously recorded location of *C. undulatum* within the survey area.

Table 4: Locations of Threatened and Priority flora species recorded within the survey area

Species	Conservation status		GPS location (GDA 94) Zone 50	
	EPBC Act	WC Act	Easting	Northing
<i>Conospermum undulatum</i>	<b>Threatened – Vulnerable</b>	Threatened	405266	6464464

#### 4.2.3 Introduced (exotic) taxa

A total of 29 introduced (exotic) taxa were recorded within the survey area (Appendix 1).

Two of these species (*Zantedeschia aethiopica* [Arum Lily] and *Asparagus asparagoides* [Bridal Creeper]) are Declared Plant species in Western Australia pursuant to section 22 of the *Biosecurity and Agriculture Management Act 2007* (BAM Act) according to the Western Australian Department of Agriculture and Food (DAFWA 2015). Table 5 and Figure 6 display the species recorded and their locations within the survey area.

Table 5: Locations of Declared Plant species pursuant to section 22 of the BAM Act recorded within the survey area

Species	GPS location (GDA 94) Zone 50	
	Easting	Northing
<i>Asparagus asparagoides</i>	406420	6464075
	406467	6464155
	406303	6464235
	406522	6464175
<i>Zantedeschia aethiopica</i>	405387	6464389
	405421	6464435
	405758	6464394
	406130	6464293



Figure 6: Locations of Declared Plant species pursuant to section 22 of the BAM Act within the survey area

Scale: 1:7,500 - A3

Meters

Coordinate System: GDA 1994 MGA Zone 50  
 Note that positional errors may occur in some areas  
 Date: 3/03/2018  
 Author: JCrute  
 Source: Aerial image: ESRI online, approx. 2012.  
 File: G:\Corwall\2018\BAM\BAM\152114\Map\_documents\RD01\Rev4\DKA1521\_01\_R001\_Nov4\_F006\_A3.mxd

**Legend**

**Species**

- *Asparagus asparagoides*
- *Zantedeschia aethiopica*

Survey area

Bush Forever site 45

DSP area

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#### 4.2.4 Accumulated species – sites surveyed (species-area curve)

The species-area curve (Figure 7), based on a species accumulation analysis was used to evaluate the adequacy of sampling (Colwell 2013). The asymptotic value was determined using Michaelis-Menten modelling. Using this analysis, the incidence based coverage estimator of species richness (ICE) was calculated to be 138.68 (Chao 2005). Based on this value, and the total of 93 species recorded during the survey; it is hypothesised that approximately 67% of the flora species potentially present within the survey area were recorded.

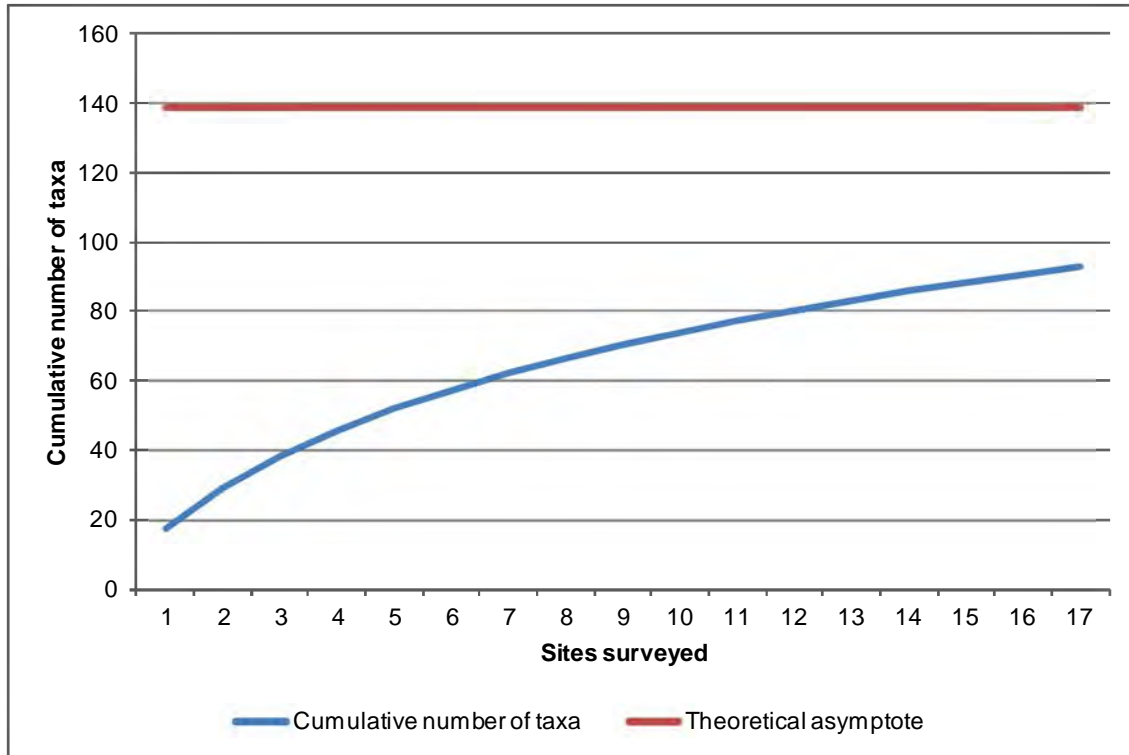


Figure 7: Averaged randomised Species Accumulation Curve

#### 4.2.5 Vegetation types

Seven native vegetation types (VTs) were defined and mapped within the survey area (Appendix 1; Figure 8) and are summarised in Table 6. Areas containing vegetation in parkland cleared or highly degraded state have not been counted as unique native VTs but have been included in Table 6 for area calculations. Total areas occupied within the survey area by each of the identified VTs are set out in Table 7.

Table 6: Vegetation Types

Vegetation Type	Description
1	<i>Eucalyptus marginata</i> , <i>Corymbia calophylla</i> and <i>Allocasuarina fraseriana</i> tall woodland over <i>Gastrolobium capitatum</i> , <i>Xanthorrhoea preissii</i> and <i>Allocasuarina humilis</i> mid sparse shrubland over <i>Banksia dallanneyi</i> , <i>Xanthorrhoea gracilis</i> , <i>Tetraria octandra</i> , <i>Ehrharta calycina</i> and <i>Briza maxima</i> low shrubland/grassland mix on grey sandy loam soils.
2	<i>Corymbia calophylla</i> tall woodland over <i>*Arundo donax</i> , <i>*Tipuana tipu</i> and <i>Trymalium odoratissimum</i> thicket over <i>Gastrolobium capitatum</i> and <i>*Watsonia meriana</i> shrubland over <i>Banksia nivea</i> and <i>Banksia dallanneyi</i> low shrubland over a mat of <i>*Tropaeolum majus</i> along the Poison Gully creekline on clay soils.
3	<i>Eucalyptus marginata</i> , <i>Corymbia calophylla</i> , <i>Allocasuarina fraseriana</i> and <i>Banksia attenuata</i> woodland over <i>Gompholobium tomentosum</i> , <i>Lambertia multiflora</i> , <i>Xanthorrhoea preissii</i> , <i>Stirlingia latifolia</i> and <i>Synaphea petiolaris</i> shrubland over <i>Mesomelaena tetragona</i> , <i>Tetraria capillaris</i> and <i>Lepidosperma leptostachyum</i> sedgeland on sandy loam soils.
4	<i>Eucalyptus marginata</i> , <i>Xylomelum occidentale</i> , <i>Acacia saligna</i> and <i>Banksia menziesii</i> open woodland over <i>*Briza maxima</i> and <i>*Ehrharta calycina</i> tall grassland on sandy loam soils.
5	<i>Corymbia calophylla</i> and <i>Eucalyptus rudis</i> tall woodland over <i>Trymalium odoratissimum</i> thicket over <i>Acacia pulchella</i> , <i>Hibbertia hypericoides</i> and <i>Xanthorrhoea preissii</i> mid sparse shrubland over <i>*Ehrharta calycina</i> , <i>*Cynodon dactylon</i> , <i>*Gladiolus caryophyllaceus</i> and <i>Tetraria octandra</i> grassland/herbland on clay soils within Poison Gully.
6	<i>Corymbia calophylla</i> woodland over <i>Trymalium odoratissimum</i> and <i>Acacia pulchella</i> thicket over <i>Xanthorrhoea preissii</i> mid sparse shrubland over <i>Banksia dallanneyi</i> low sparse shrubland <i>*Ehrharta calycina</i> , <i>*Briza maxima</i> , <i>*Cynodon dactylon</i> grassland on clay loam soils above the Poison Gully banks.
7	<i>Eucalyptus marginata</i> woodland over <i>Xanthorrhoea preissii</i> tall sparse shrubland over <i>*Ehrharta calycina</i> and <i>*Briza maxima</i> tall grassland on sandy loam soils.
P	Parkland cleared areas
C	Cleared areas.

### Vegetation type coverage

The total area mapped within the survey area was 16.08 ha which includes parkland cleared and fully cleared areas (Table 7). The dominant native VT within the survey area was VT 5 which can be broadly described as a *Corymbia calophylla* and *Eucalyptus rudis* tall woodlands within Poison Gully.

Table 7: Area (ha) covered by each VT within the survey area

VT	Area (ha)	Percentage of the Survey area
1	0.97	6.05
2	0.99	6.17
3	0.85	5.27
4	0.98	6.07
5	6.25	38.85
6	0.68	4.20
7	1.27	7.90
P	2.39	14.89
C	1.70	10.57
<b>TOTAL</b>	<b>16.08</b>	<b>100</b>





Figure 8: Vegetation Types (VTs) mapped within the survey area



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#### 4.2.6 Vegetation condition

The survey area shows signs of having been degraded for a long period of time. Urban development within the survey area and surrounds has led to degradation of vegetation with impacts including:

- invasive species
- clearing of vegetation
- bank destabilisation.

Some areas of vegetation were in significantly better condition than others and as such, vegetation condition within the survey ranged from Excellent to Completely Degraded (Keighery 1994; Figure 9; Table 8).

Table 9 gives a numerical breakdown of the area occupied by each vegetation condition rating within the survey area.

Table 8: Vegetation condition scale (Keighery 1994)

Condition rating	Description
Pristine (1)	Pristine or nearly so, no obvious sign of disturbance.
Excellent (2)	Vegetation structure intact, disturbance affecting individual species and weeds are non-aggressive species.
Very Good (3)	Vegetation structure altered obvious signs of disturbance. For example, disturbance to vegetation structure caused by repeated fires, the presence of some more aggressive weeds, dieback, logging and grazing.
Good (4)	Vegetation structure significantly altered by obvious signs of multiple disturbances. Retains basic vegetation structure or ability to regenerate it. For example, disturbance to vegetation structure caused by very frequent fires, the presence of some very aggressive weeds at high density, partial clearing, dieback, grazing.
Degraded (5)	Basic vegetation structure severely impacted by disturbance. Scope for regeneration but not to a state approaching good condition without intensive management. For example, disturbance to vegetation structure caused by very frequent fires, the presence of very aggressive weeds, partial clearing, dieback and grazing.
Completely Degraded (6)	The structure of the vegetation is no longer intact and the area is completely or almost completely without native species. These areas are often described as 'parkland cleared' with the flora comprising weed or crop species with isolated native trees or shrubs.

Table 9: Area (ha) covered by each vegetation condition category within the survey area

Vegetation Condition	Area (ha)	Percentage of the Survey area
Excellent	0.48	3.00
Very Good – Excellent	0.49	3.05
Very Good	0.21	1.31
Good	1.44	8.97
Good – Degraded	0.98	6.07
Degraded	0.98	6.08
Completely Degraded	8.58	53.37
Cleared	2.92	18.15
<b>Total</b>	<b>16.08</b>	<b>100</b>

### 4.3 FCT similarity analysis

Remnant vegetation of the southern Swan Coastal Plain was surveyed and mapped by Gibson *et al.* (1994) to provide an understanding of the major floristic types and transitions across the region. The major FCTs were defined by classifying the data collected according to the similarities in species composition between plots. When determining the FCT of a new record, a floristic analysis of species composition provides the most robust method that is consistent with the original classification.

Obvious limitations are associated with determining and mapping the presence of FCTs within the survey area. Structurally, vegetation has been modified due to widespread and sustained weed invasion which has resulted in the understorey being almost completely replaced by exotic species in some areas. As a result, species richness (per quadrat) in the current survey was markedly lower than that recorded by Gibson *et al.* (1994). In addition, vegetation mapping requires the extrapolation of quadrat data to generalise vegetation communities and map 'like' vegetation over relatively small spatial scales. Significant groupings of quadrats and resultant delineation of vegetation communities are primarily determined *a-priori*. Comparing this type of data with that of Gibson *et al.* (1994), which contains accumulated species data over successive seasons within known vegetation communities across the Swan Coastal Plain, is problematic.

At present, there is no single consistent method for the determination of FCTs for vegetation data in the Swan Coastal Plain. Therefore, three different methods were used to analyse the data collected from the survey area, the results of which were compared to determine the most likely result (refer to section 3.3).

The following results have been interpreted from Plantecology (2015), which is presented in Appendix 5.

The low numbers of native species recorded from the survey area attributed to degradation resulted in an inconclusive assignment of any specific FCT to vegetation within the survey area.

Vegetation within the following lots bear some resemblance to FCTs, however results are not conclusive due to the low numbers of species recorded:

- 32 Brae Road: FCT 3b (i.e. VT 3)
- 231 Maida Vale Road: FCT 3b (i.e. VT 1)
- 15 Milner Road: FCT 20a (i.e. VT 1)<sup>2</sup>
- 80 Brae Road (within Bush Forever Site 45): 3c (i.e. VT 7)
- Eastern portion of Bush Forever Site 45: FCT 3c (i.e. VT 6).

<sup>2</sup> VT 1 bore resemblance to two FCTs.

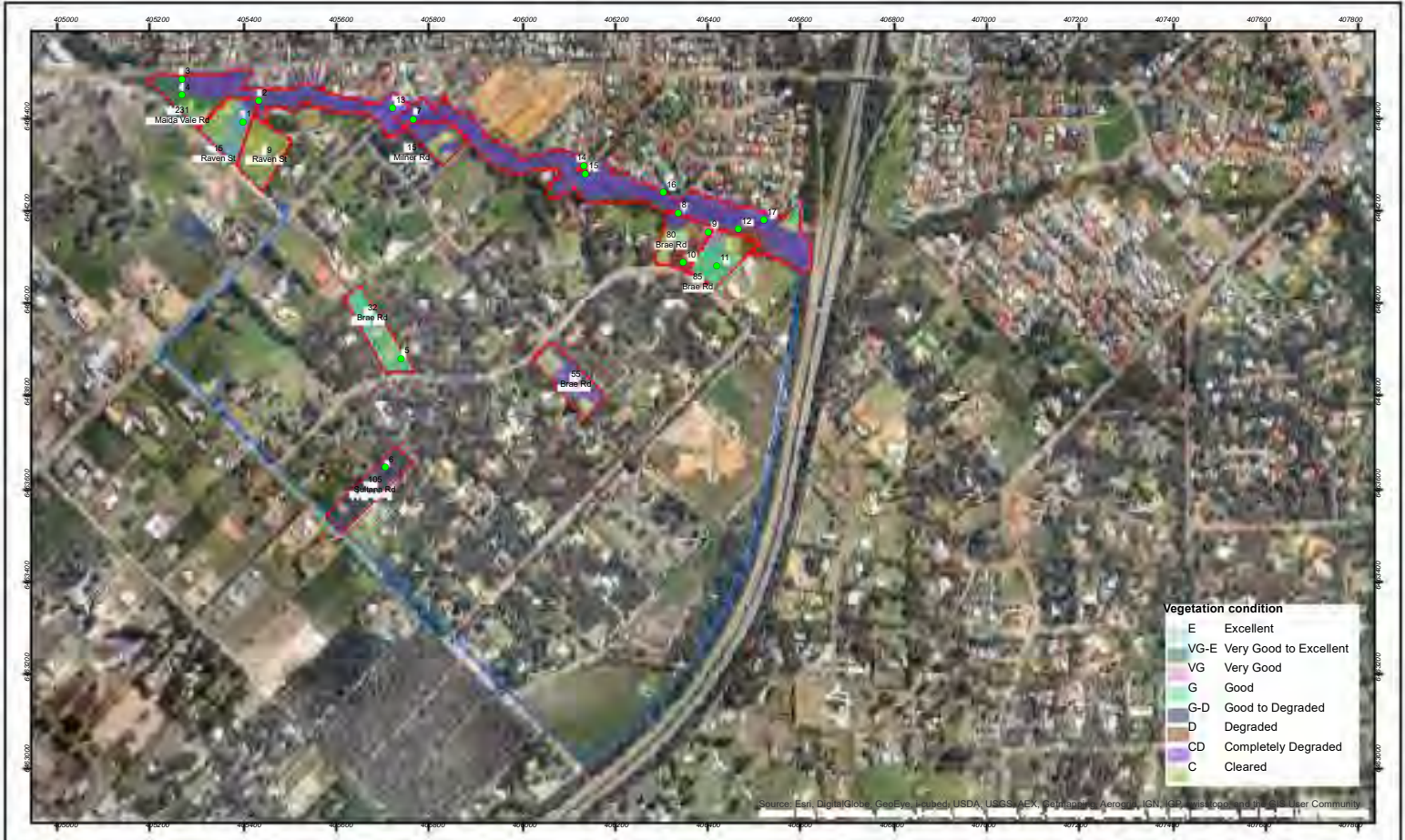


Figure 9: Vegetation condition within the survey area

Scale 1:7,500 at A3

Coordinate System: GDA 1994 MGA Zone 50  
 Note that positional errors may occur in some areas  
 Date: 4/23/2016  
 Author: JCrute  
 Source: Background aerial image: ESRI online, approx. 2012; Aerial image: Landgate 2011.  
 Path: Q:\Data\2016\BKA\13271\Map\_documents\2016\BKA\13271\_05\_R001\_Bush\_F009\_A3.mxd

**Legend**

- Sites
- Bush Forever site 45
- DSP area
- Survey area

**Vegetation condition**

- E Excellent
- VG-E Very Good to Excellent
- VG Very Good
- G Good
- G-D Good to Degraded
- D Degraded
- CD Completely Degraded
- C Cleared

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### 4.3.1 Threatened and Priority Ecological Communities

Five TECs were identified as occurring within 500 m of the DSP area as displayed Figure 5 and listed below:

- SCP 20a (TEC listed under the WC Act)
- SCP 20b (TEC listed under the WC Act)
- SCP 3a (TEC listed under the EPBC Act)
- SCP 3b (TEC listed under the WC Act)
- SCP 20c (TEC listed under the EPBC Act).

The highly degraded nature of the survey area makes a comparison between VTs and FCTs highly problematic, however, there is a possibility that FCT 20a '*Banksia attenuata woodlands over species rich dense shrublands*' (a listed TEC under the WC Act) and FCT 3b '*Corymbia calophylla – Eucalyptus marginata woodlands on sandy clay soils of the southern Swan Coastal Plain*' (a listed TEC under the WC Act) occur within the survey area, albeit in a highly degraded state. Additionally, results of the FCT analyses also suggest that SCP 3c '*Corymbia calophylla – Xanthorrhoea preissii woodlands and shrublands, Swan Coastal Plain*' (a listed TEC under the EPBC Act) may also occur within the survey area. The degraded nature of vegetation within the survey area however, leaves these determinations open to interpretation.

Table 10 presents a numerical breakdown of the similarity between vegetation within the survey area to known FCTs. It is evident that the level of species diversity within the survey area is significantly lower than that within recorded FCTs. Additionally, a large amount of typical FCT species identified in Gibson *et al.* (1994) are missing from mapped vegetation types within the survey area. These two factors considerably reduce the likelihood of vegetation within the survey area being resemblant of known FCTs and subsequently TECs.

Table 10: Comparison between VTs and known FCTs

VT	FCT resemblance	Number of species recorded in VT	Number of species recorded in FCT	FCT typical species missing from VT (Gibson et al. 1994)
VT 1	SCP 3b	43	323	<i>Bossiaea eriocarpa, Banksia nivea, Burchardia congesta, Caesia micrantha, Chamaescilla corymbosa, Conostylis juncea, Drosera erythrorhiza, Drosera stolonifera, Lepidosperma angustatum, Lomandra hermaphrodita, Mesomelaena tetragona, Sowerbaea laxiflora.</i>
VT 1	SCP 20a	43	261	<i>Banksia attenuata, Bossiaea eriocarpa, Conostephium pendulum, Hibbertia huegelii, Petrophile linearis, Scaevola repens, Alexgeorgea nitens, Burchardia congesta, Drosera erythrorhiza, Drosera menziesii subsp. penicillaris, Lomandra hermaphrodita, Lyginia barbata.</i>
VT 3	SCP 3b	27	323	<i>Banksia nivea, Burchardia congesta, Caesia micrantha, Chamaescilla corymbosa, Conostylis juncea, Drosera erythrorhiza, Drosera stolonifera, Lepidosperma angustatum, Lomandra hermaphrodita, Sowerbaea laxiflora.</i>
VT 6	SCP 3c	30	227	<i>Burchardia congesta, Cyathochaeta avenacea.</i>
VT 7	SCP 3c	25	227	<i>Burchardia congesta, Cyathochaeta avenacea.</i>

## 5. Discussion

Vegetation within the survey area comprises seven native VTs as well as parkland cleared and fully cleared areas. Transitions between VTs were generally discontinuous, though occasionally abrupt with margins representing admixtures of more than one VT. This discontinuity is primarily due to changes in soil profile and topography, and presence of cleared areas. At a broad scale, the majority of the survey area was observed to be in various states of degradation due to surrounding urban development with vegetation ranging from eucalypt woodlands over relatively dense understorey species, creekline vegetation and highly modified vegetation within large rural-residential lots.

The flora and vegetation assessment conducted within the survey area was undertaken during October, within the prime flowering time for the majority of species within the area. Field reconnaissance involved traversing the entire survey area, which ensures that an accurate representation of all VTs and potential conservation significant flora were obtained.

The number of native and exotic species recorded on the survey area totalled 62 native vascular plant taxa from 43 plant genera and 21 plant families as well as 29 exotic taxa. Two Declared Plant species pursuant to section 22 of the BAM Act (*Zantedeschia aethiopica* [Arum Lily] and *Asparagus asparagoides* [Bridal Creeper]) were recorded within the survey area (DAFWA 2015). The relatively low number of plant species recorded reflects the disturbed nature of the survey area.

No conservation significant species were recorded within the survey area. Effort was made during the field assessment to look for areas of suitable habitat for conservation significant species but none were found, which is likely related to the disturbed nature of the survey area. Given that the survey was conducted within the prime flowering time for majority of the conservation significant species, it is highly unlikely that any conservation significant species are present within the survey area.

Vegetation condition within the survey area ranged from Excellent to Completely Degraded (Keighery 1994), with majority of the survey area (approximately 60%) mapped to be in 'Completely Degraded' or 'Degraded' condition.

On the basis of the statistical analyses undertaken by Plantecology (2015) the following conservation significant floristic community types (FCT) potentially occur within the survey area: FCT 20a '*Banksia attenuata* woodlands over species rich dense shrublands' (a listed TEC under the WC Act), FCT 3b '*Corymbia calophylla* – *Eucalyptus marginata* woodlands on sandy clay soils of the southern Swan Coastal Plain' (a listed TEC under the WC Act) and SCP 3c '*Corymbia calophylla* – *Xanthorrhoea preissii* woodlands and shrublands, Swan Coastal Plain' (a listed TEC under the EPBC Act).

The degraded nature of vegetation within the survey area provides a significant level of uncertainty regarding these designations against potentially significant communities. This is demonstrated by reference to Table 10, where it can be seen that the number of species recorded within each vegetation type are significantly less than number of species known to be associated with each FCT. A number of key species are missing from each FCT type within the survey area which could potentially be attributed to either degradation or the lack of these species within the vegetation, thus excluding these areas from the definition of the identified TECs.

On the basis of Strategen's assessment, it is considered unlikely that the vegetation recorded within the DSP area represents viable representatives of FCT's of conservation significance due to the limited number of species represented. The statistical analysis report provided at Appendix 5 provides detail regarding the level of uncertainty regarding the assignment of FCT's against the results.



Areas containing these potential TECs include:

- 32 Brae Road: FCT 3b
- 231 Maida Vale Road: FCT 3b
- 15 Milner Road: FCT 20a
- 80 and 85 Brae Road (within Bush Forever Site 45): FCT 3c
- Eastern portion of Bush Forever Site 45: FCT 3c.

Consideration is provided on whether the values of Bush Forever site 45 that are within private lots have retained sufficient values for the Bush Forever classification to be retained.


Bush Forever Site 45 was listed due to the following values:

- representation of ecological communities
- rarity
- general criteria for the protection of wetland, streamline and estuarine fringing vegetation and coastal vegetation.

Vegetation within Bush Forever site 45 varied in condition depending on landscape and urban factors (e.g. vegetation was more degraded along the banks of Poison Gully and around urban development). The western portion of Bush Forever site 45, specifically 231 Maida Vale Road and 15 Raven Street, High Wycombe were observed to be in significantly better condition than the remainder of the site within the survey area. The incision formed by Poison Gully was heavily infested by exotic species and would require significant remedial efforts to facilitate the return of native species and vegetation structure. The portion of Bush Forever Site 45 within 80 and 85 Brae Road, High Wycombe was observed to be in a degraded state due to impacts including clearing of vegetation and grazing. These areas were not as degraded as the banks of Poison Gully but contain a large amount of exotic species and in some areas, heavily modified vegetation structure.

An assessment of the values contained within each of the private lots that are listed as wholly or partially within Bush Forever site 45 is provided in Table 11 below. Additionally a recommendation of whether the potential exists for an application to be made to remove the Bush Forever listing over part or all of the property is provided. It should be understood that changes to Bush Forever sites are typically considered in the context of development proposals. The Department of Planning and the Western Australian Planning Commission will need to be approached to determine the most appropriate process through which to make application for an amendment to the boundary of Bush Forever site 45.

Table 11: Bush Forever values on private lots

Property	Vegetation Value	Bush Forever values present	Recommendation
85 Brae Rd	Vegetation potentially aligns with FCT 3c (south and north west of property)	<ul style="list-style-type: none"> <li>• ecological communities</li> <li>• rarity</li> <li>• general criteria for the protection of wetland, streamline and estuarine fringing vegetation and coastal vegetation.</li> </ul>	The majority of the vegetation is in Good or worse condition (cleared or degraded). Whilst some alignment with FCT 3c, the quality of the vegetation south of the dwelling is sufficiently degraded to provide the potential for the Bush Forever designation to be removed entirely or retracted to only include the northern extremity of the property given the proximity of this area to Poison Gully.
 80 Brae Rd	Vegetation potentially aligns with FCT 3c (south east and north east of property)	<ul style="list-style-type: none"> <li>• ecological communities</li> <li>• rarity</li> <li>• general criteria for the protection of wetland, streamline and estuarine fringing vegetation and coastal vegetation.</li> </ul>	<p>The vegetation contained within the Bush Forever site is predominantly in a Degraded and Good-Degraded condition, with a small area in Very Good condition in the north east of the site.</p> <p>Given the impacted values of property the potential exists for the Bush Forever designation to be removed entirely or retracted to only include the northern extremity of the property give the proximity of this area to Poison Gully.</p>

Property	Vegetation Value	Bush Forever values present	Recommendation
15 Milner Rd	Within the Bush Forever site the vegetation does not align with potentially significant FCT's.	<ul style="list-style-type: none"> <li>• general criteria for the protection of wetland, streamline and estuarine fringing vegetation and coastal vegetation.</li> </ul>	The portion of the property that is contained within the Bush Forever site is in proximity to Poison Gully and therefore it is considered unlikely that the Bush Forever boundary would be modified.
15 Raven Street	Vegetation potentially aligns with FCT 3b (eastern side of property)	<ul style="list-style-type: none"> <li>• ecological communities</li> <li>• rarity</li> <li>• general criteria for the protection of wetland, streamline and estuarine fringing vegetation and coastal vegetation.</li> </ul>	<p>The western half of the property is cleared and is therefore inconsistent with the Bush Forever designation. Removal of the Bush Forever designation of this portion of the site should be pursued.</p> <p>It is anticipated that a more uniform future development footprint would be pursued. It is considered that the greatest likelihood of successfully removing the Bush Forever designation over the vegetated portion of the property would be achieved by focussing on the vegetation adjacent to Raven Street.</p>
231 Maida Vale Road	Vegetation potentially aligns with FCT 3b (central and western property)	<ul style="list-style-type: none"> <li>• ecological communities</li> <li>• rarity</li> <li>• general criteria for the protection of wetland, streamline and estuarine fringing vegetation and coastal vegetation.</li> </ul>	The portion of the property that is cleared is inconsistent with the Bush Forever designation. It is considered unlikely that removal of the Bush Forever designation would be successful over any other portion of the property.

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**Appendix 1**  
**Vascular plant taxa recorded by site**  
**and vegetation type**

Species	Sites																
	1	4	2	3	5	6	7	8	12	13	14	15	16	17	9	10	11
<i>Acacia celastrifolia</i>													X				
<i>Acacia pulchella</i>	X		X	X				X	X			X	X	X	X		X
<i>Acacia saligna</i>						X				X							X
<i>Allocasuarina fraseriana</i>		X			X												
<i>Allocasuarina humilis</i>	X	X													X		X
<i>Anigozanthos manglesii</i>	X	X			X										X		
* <i>Arundo donax</i>			X	X													
* <i>Asparagus asparagoides</i>														X			X
* <i>Avena fatua</i>										X	X	X		X			
<i>Banksia attenuata</i>					X												
<i>Banksia dallanneyi</i>	X	X	X	X				X	X			X	X	X	X	X	X
<i>Banksia menziesii</i>						X											
<i>Banksia nivea</i>		X	X	X													
<i>Bossiaea eriocarpa</i>					X												
* <i>Briza maxima</i>	X	X			X	X		X	X	X	X	X	X	X	X	X	X
* <i>Briza minor</i>									X								
<i>Burchardia congesta</i>		X			X										X	X	
<i>Caustis dioica</i>		X													X		
<i>Chamelaucium uncinatum</i> (P)		X															
<i>Conostylis setosa</i>	X	X															
<i>Corymbia calophylla</i>	X	X	X	X	X		X	X	X	X	X	X	X	X	X	X	X
* <i>Corymbia maculata</i>										X							
* <i>Cynodon dactylon</i>								X	X		X	X	X	X	X		
* <i>Cyperus eragrostis</i>										X							
<i>Dasypogon bromeliifolius</i>		X															
<i>Daviesia decurrens</i>					X												
<i>Daviesia preissii</i>		X															
<i>Desmocladius fasciculatus</i>	X	X															
<i>Dianella revoluta</i>								X	X			X	X				
* <i>Ehrharta calycina</i>	X	X			X	X		X	X			X	X	X	X	X	X
<i>Eucalyptus marginata</i>	X	X			X	X										X	X
<i>Eucalyptus rudis</i>							X	X	X	X	X	X	X				
* <i>Euphorbia terracina</i>										X							
* <i>Freesia alba</i> x <i>leichtlinii</i>														X	X	X	
* <i>Fumaria capreolata</i>							X			X							X
<i>Gastrolobium bilobum</i>								X	X			X	X				
<i>Gastrolobium capitatum</i>	X	X	X	X										X			
* <i>Gladiolus caryophyllaceus</i>	X	X			X			X	X			X	X			X	X
<i>Gompholobium tomentosum</i>					X												
<i>Haemodorum laxum</i>		X			X												X
<i>Haemodorum spicatum</i>					X												
<i>Hakea trifurcata</i>													X	X			
<i>Hakea undulata</i>														X			
<i>Hibbertia commutata</i>	X																
<i>Hibbertia hypericoides</i>	X	X			X			X	X			X	X				
<i>Hovea? trisperma</i>		X															
* <i>Hyparrhenia hirta</i>										X							
* <i>Hypochaeris glabra</i>	X				X					X						X	
* <i>Ipomoea cairica</i>						X							X				
<i>Isolepis cernua</i> var. <i>setiformis</i>	X																
* <i>Juncus acutus</i>										X							
<i>Kennedia coccinea</i>					X								X			X	
<i>Lambertia multiflora</i>					X												
<i>Lasiopetalum floribundum</i>														X			
<i>Lechenaultia biloba</i>	X																
<i>Lepidosperma leptostachyum</i>		X			X									X			

Legend
VT1
VT2
VT3
VT4
VT5
VT6
VT7

Species	1	4	2	3	5	6	7	8	12	13	14	15	16	17	9	10	11
* <i>Lysimachia arvensis</i>	x									x							
<i>Melaleuca nesophila</i> (P)		x															
<i>Melaleuca preissiana</i>										x							
<i>Melaleuca radula</i>													x				
<i>Melaleuca raphiophylla</i>										x							
<i>Mesomelaena pseudostygia</i>	x	x													x	x	
<i>Mesomelaena tetragona</i>					x						x						
<i>Neurachne alopecuroidea</i>															x		
Orchidaceae sp.																	x
* <i>Oxalis pes-caprae</i>										x	x						
<i>Patersonia occidentalis</i>	x	x															
<i>Petrophile striata</i>															x	x	
* <i>Ricinus communis</i>			x	x													
<i>Scaevola calliptera</i>					x												
* <i>Solanum nigrum</i>							x										
* <i>Sonchus oleraceus</i>										x							
<i>Stirlingia latifolia</i>	x	x			x												
<i>Stylidium piliferum</i>		x															
<i>Stylidium</i> sp.		x															
<i>Synaphea petiolaris</i>					x												
<i>Tetraria capillaris</i>	x				x										x		x
<i>Tetraria octandra</i>	x	x	x	x	x		x	x				x	x	x	x	x	x
<i>Thomasia macrocarpa</i>	x			x					x	x		x	x	x			
<i>Thysanotus manglesianus</i>															x	x	
* <i>Tipuana tipu</i>			x	x													
<i>Trachymene pilosa</i>		x															x
* <i>Tropaeolum majus</i>			x	x			x			x	x				x		
<i>Trymalium ledifolium</i>															x		
<i>Trymalium odoratissimum</i>			x	x				x	x	x	x	x	x	x	x	x	
* <i>Typha orientalis</i>											x	x					
* <i>Ursinia anthemoides</i>		x															
* <i>Urtica urens</i>			x	x													
* <i>Watsonia meriana</i>	x		x	x							x	x		x			
<i>Xanthorrhoea gracilis</i>	x				x												x
<i>Xanthorrhoea preissii</i>	x	x			x		x	x				x	x	x	x	x	x
<i>Xylomelum occidentale</i>						x											
* <i>Zantedeschia aethiopica</i>			x	x			x				x						

\* denotes introduced (exotic) species (Western Australian Herbarium 1998-)

P = Planted species

**Appendix 2**  
**Photographic record of vegetation**  
**types**





Plate 1: Site 1 (VT 1)



Plate 2: Site 2 (VT 2)



Plate 3: Site 3 (VT2)



Plate 4: Site 4 (VT 1)



Plate 5: Site 5 (VT 3)



Plate 6: Site 6 (VT 4)



Plate 7: Site 7 (VT 5)



Plate 8: Site 8 (VT 5)



Plate 9: Site 9 (VT 6)



Plate 10: VT 7



Plate 11: Site 11 (VT 7)

**Appendix 3**  
**Desktop assessment results (Parks and**  
**Wildlife 2007-, DotE 2015b)**

# NatureMap Species Report

Created By Daniel Panickar on 20/10/2015

Kingdom Plantae

Current Names Only Yes

Core Datasets Only Yes

Method 'By Circle'

Centre 116°00' 19" E,31°57' 11" S

Buffer 5km

Group By Family

Family	Species	Records
Alstroemeriaceae	1	1
Amaranthaceae	3	6
Anarthriaceae	2	10
Apiaceae	9	33
Apocynaceae	1	1
Araceae	3	5
Araliaceae	2	18
Archidiaceae	1	1
Asparagaceae	30	140
Asphodelaceae	1	1
Asteraceae	35	103
Boraginaceae	2	3
Boryaceae	1	5
Brassicaceae	2	2
Bryaceae	4	6
Byblidaceae	1	4
Campanulaceae	6	17
Caprifoliaceae	1	1
Caryophyllaceae	3	3
Casuarinaceae	3	14
Celastraceae	3	10
Centrolepidaceae	5	13
Chenopodiaceae	1	1
Colchicaceae	4	20
Commelinaceae	1	1
Convolvulaceae	1	2
Crassulaceae	3	4
Cupressaceae	1	1
Cyperaceae	46	147
Dasypogonaceae	5	24
Dicranaceae	2	3
Dilleniaceae	11	61
Dioscoreaceae	1	2
Ditrichaceae	2	2
Droseraceae	16	49
Elaeocarpaceae	4	9
Ericaceae	22	78
Euphorbiaceae	6	14
Fabaceae	89	343
Funariaceae	1	1
Gentianaceae	3	6
Geraniaceae	1	2
Goodeniaceae	13	59
Haemodoraceae	25	130
Haloragaceae	2	14
Hemerocallidaceae	12	63
Hydrocharitaceae	1	1
Hypoxidaceae	2	2
Iridaceae	16	52
Juncaceae	2	3
Juncaginaceae	1	1
Lamiaceae	7	23
Lauraceae	5	20
Lentibulariaceae	1	1
Linaceae	1	3
Loganiaceae	1	1
Loranthaceae	2	2
Lythraceae	1	1
Malvaceae	7	29
Menyanthaceae	2	3
Molluginaceae	2	19
Myrtaceae	51	156
Oleaceae	2	6
Oleaceae	1	1
Onagraceae	1	1
Orchidaceae	42	107
Orobanchaceae	3	5
Oxalidaceae	4	7
Papaveraceae	1	1
Philydraceae	2	3
Phyllanthaceae	3	9
Phytolaccaceae	1	1
Pittosporaceae	5	9
Plantaginaceae	2	2
Poaceae	41	124



Polygalaceae	2	8
Polygonaceae	3	3
Portulacaceae	2	4
Pottiaceae	2	5
Primulaceae	1	1
Proteaceae	67	477
Pteridaceae	3	9
Ranunculaceae	1	3
Restionaceae	13	49
Rhamnaceae	6	19
Rubiaceae	3	6
Rutaceae	10	26
Salviniaceae	1	1
Santalaceae	1	1
Sapindaceae	1	3
Scrophulariaceae	1	2
Semotophyllaceae	1	2
Solanaceae	1	1
Stylidiaceae	29	107
Tecophilaeaceae	1	1
Thymelaeaceae	7	16
Verbenaceae	1	1
Violaceae	1	5
Xanthorrhoeaceae	4	20
Zamiaceae	1	5
<b>TOTAL</b>	<b>764</b>	<b>2801</b>

Name ID	Species Name	Naturalised	Conservation Code	Endemic To Query Area
<b>Alstroemeriaceae</b>				
1.	20755 <i>Alstroemeria psittacina</i>	Y		
<b>Amaranthaceae</b>				
2.	2648 <i>Alternanthera denticulata</i> (Lesser Joyweed)			
3.	2720 <i>Ptilotus esquamatus</i>			
4.	2742 <i>Ptilotus manglesii</i> (Pom Poms, Mulamula)			
<b>Anarthriaceae</b>				
5.	1097 <i>Lyginia barbata</i>			
6.	18049 <i>Lyginia imberbis</i>			
<b>Apiaceae</b>				
7.	6205 <i>Actinotus leucocephalus</i> (Flannel Flower)			
8.	6218 <i>Daucus glochidiatus</i> (Australian Carrot)			
9.	15446 <i>Eryngium pinnatifidum</i> subsp. <i>pinnatifidum</i>			
10.	6222 <i>Homalosciadium homalocarpum</i>			
11.	6245 <i>Pentapeltis peltigera</i>			
12.	6255 <i>Platysace juncea</i>			
13.	11132 <i>Platysace ramosissima</i>		P3	
14.	6284 <i>Xanthosia candida</i>			
15.	6289 <i>Xanthosia huegelii</i>			
<b>Apocynaceae</b>				
16.	6587 <i>Gomphocarpus fruticosus</i> (Narrowleaf Cottonbush)	Y		
<b>Araceae</b>				
17.	28342 <i>Landoltia punctata</i> (Thin Duckweed)			
18.	1051 <i>Lemna disperma</i> (Duckweed)			
19.	1049 <i>Zantedeschia aethiopica</i> (Arum Lily)	Y		
<b>Araliaceae</b>				
20.	6226 <i>Hydrocotyle callicarpa</i> (Small Pennywort)			
21.	6280 <i>Trachymene pilosa</i> (Native Parsnip)			
<b>Archidiaceae</b>				
22.	32314 <i>Archidium rehmannii</i>			
<b>Asparagaceae</b>				
23.	8779 <i>Asparagus asparagoides</i> (Bridal Creeper)	Y		
24.	1280 <i>Chamaescilla corymbosa</i> (Blue Squill)			
25.	11299 <i>Chamaescilla corymbosa</i> var. <i>corymbosa</i>			
26.	8788 <i>Chamaescilla versicolor</i>			
27.	1287 <i>Dichopogon capillipes</i>			
28.	1289 <i>Dichopogon preissii</i>			
29.	11911 <i>Laxmannia ramosa</i> subsp. <i>ramosa</i>			
30.	11464 <i>Laxmannia sessiliflora</i> subsp. <i>australis</i>			
31.	1309 <i>Laxmannia squarrosa</i>			
32.	1223 <i>Lomandra caespitosa</i> (Tufted Mat Rush)			
33.	1228 <i>Lomandra hermaphrodita</i>			
34.	1232 <i>Lomandra micrantha</i> (Small-flower Mat-rush)			
35.	14542 <i>Lomandra micrantha</i> subsp. <i>micrantha</i>			
36.	1234 <i>Lomandra nigricans</i>			
37.	1236 <i>Lomandra odora</i> (Tiered Matrush)			
38.	1239 <i>Lomandra preissii</i>			
39.	1240 <i>Lomandra purpurea</i> (Purple Mat Rush)			
40.	1243 <i>Lomandra sericea</i> (Silky Mat Rush)			
41.	1245 <i>Lomandra spartea</i>			
42.	1246 <i>Lomandra suaveolens</i>			
43.	1312 <i>Sowerbaea laxiflora</i> (Purple Tassels)			
44.	1318 <i>Thysanotus arbuscula</i>			
45.	1330 <i>Thysanotus fastigiatus</i>			
46.	1338 <i>Thysanotus manglesianus</i> (Fringed Lily)			
47.	1339 <i>Thysanotus multiflorus</i> (Many-flowered Fringe Lily)			
48.	1343 <i>Thysanotus patersonii</i>			
49.	1351 <i>Thysanotus sparteus</i>			
50.	1354 <i>Thysanotus tenellus</i>			
51.	1357 <i>Thysanotus thyrsoides</i>			
52.	1358 <i>Thysanotus triandrus</i>			
<b>Asphodelaceae</b>				
53.	1364 <i>Asphodelus fistulosus</i> (Onion Weed)	Y		

Name ID	Species Name	Naturalised	Conservation Code	<sup>1</sup> Endemic To Query Area
<b>Asteraceae</b>				
54.	7927 <i>Chrysanthemoides monilifera</i> (Boneseed)	Y		
55.	11900 <i>Chrysanthemoides monilifera</i> subsp. <i>monilifera</i>	Y		
56.	7945 <i>Cotula coronopifolia</i> (Waterbuttons)	Y		
57.	13354 <i>Craspedia variabilis</i>			
58.	7953 <i>Crepis foetida</i> (Foetid Hawksbeard)	Y		
59.	8450 <i>Eclipta prostrata</i>	Y		
60.	12741 <i>Hyalosperma cotula</i>			
61.	8086 <i>Hypochoeris glabra</i> (Smooth Catsear)	Y		
62.	9352 <i>Hypochoeris radicata</i> (Flat Weed)	Y		
63.	18585 <i>Lagenophora huegelii</i>			
64.	13284 <i>Lawrencella rosea</i>			
65.	8106 <i>Millotia tenuifolia</i> (Soft Millotia)			
66.	14344 <i>Millotia tenuifolia</i> var. <i>tenuifolia</i> (Soft Millotia)			
67.	8143 <i>Olearia paucidentata</i> (Autumn Scrub Daisy)			
68.	8175 <i>Podolepis gracilis</i> (Slender Podolepis)			
69.	8177 <i>Podolepis lessonii</i>			
70.	8182 <i>Podotroche angustifolia</i> (Sticky Longheads)			
71.	13255 <i>Pterochaeta paniculata</i>			
72.	8195 <i>Quinetia urvillei</i>			
73.	13300 <i>Rhodanthe citrina</i>			
74.	15035 <i>Rhodanthe corymbosa</i>			
75.	8205 <i>Senecio gilbertii</i>		P1	
76.	8206 <i>Senecio glomeratus</i> (Cluster-headed Fireweed)			
77.	20663 <i>Senecio multicaulis</i> subsp. <i>multicaulis</i>			
78.	20161 <i>Senecio pinnatifolius</i>			
79.	8224 <i>Siloxerus filifolius</i>			
80.	8225 <i>Siloxerus humifusus</i> (Procumbent Siloxerus)			
81.	14583 <i>Siloxerus multiflorus</i>			
82.	8231 <i>Sonchus oleraceus</i> (Common Sowthistle)	Y		
83.	8251 <i>Trichocline spathulata</i> (Native Gerbera)			
84.	8255 <i>Ursinia anthemoides</i> (Ursinia)	Y		
85.	38388 <i>Ursinia anthemoides</i> subsp. <i>anthemoides</i>	Y		
86.	8257 <i>Vellereophyton dealbatum</i> (White Cudweed)	Y		
87.	15725 <i>Verbesina encelioides</i>	Y		
88.	44861 <i>Xerochrysum macranthum</i>			
<b>Boraginaceae</b>				
89.	6681 <i>Echium plantagineum</i> (Paterson's Curse)	Y		
90.	6686 <i>Halgania corymbosa</i>		P3	
<b>Boryaceae</b>				
91.	1273 <i>Borya sphaerocephala</i> (Pincushions)			
<b>Brassicaceae</b>				
92.	3016 <i>Heliophila pusilla</i>	Y		
93.	3061 <i>Raphanus raphanistrum</i> (Wild Radish)	Y		
<b>Bryaceae</b>				
94.	32375 <i>Gemmabryum chrysonuron</i>			
95.	32380 <i>Gemmabryum pachythecum</i>			
96.	44608 <i>Rosulabryum billardieri</i>			
97.	32432 <i>Schizymenium bryoides</i>			
<b>Byblidaceae</b>				
98.	3178 <i>Byblis gigantea</i> (Rainbow Plant)		P3	
<b>Campanulaceae</b>				
99.	7396 <i>Isotoma hypocrateriformis</i> (Woodbridge Poison)			
100.	7403 <i>Lobelia heterophylla</i> (Wing-seeded Lobelia)			
101.	7406 <i>Lobelia rhombifolia</i> (Tufted Lobelia)			
102.	7407 <i>Lobelia rhytidosperra</i> (Wrinkled-seeded Lobelia)			
103.	7384 <i>Wahlenbergia capensis</i> (Cape Bluebell)	Y		
104.	7389 <i>Wahlenbergia preissii</i>			
<b>Caprifoliaceae</b>				
105.	35322 <i>Centranthus ruber</i> subsp. <i>ruber</i>	Y		
<b>Caryophyllaceae</b>				
106.	19825 <i>Petrohragia dubia</i>	Y		
107.	2909 <i>Silene gallica</i> (French Catchfly)	Y		
108.	2912 <i>Spergula arvensis</i> (Corn Spurry)	Y		
<b>Casuarinaceae</b>				

Name ID	Species Name	Naturalised	Conservation Code	<sup>1</sup> Endemic To Query Area
109.	1728 <i>Allocasuarina fraseriana</i> (Sheoak, Kondil)			
110.	1732 <i>Allocasuarina humilis</i> (Dwarf Sheoak)			
111.	1739 <i>Allocasuarina thuyoides</i> (Horned Sheoak)			
<b>Celastraceae</b>				
112.	4733 <i>Stackhousia monogyna</i>			
113.	9070 <i>Stackhousia pubescens</i> (Downy Stackhousia)			
114.	4737 <i>Tripterococcus brunonis</i> (Winged Stackhousia)			
<b>Centrolepidaceae</b>				
115.	1117 <i>Aphelia cyperoides</i>			
116.	43548 <i>Aphelia</i> sp. Albany (B.G. Briggs 596)			
117.	1121 <i>Centrolepis aristata</i> (Pointed Centrolepis)			
118.	1125 <i>Centrolepis drummondiana</i>			
119.	1131 <i>Centrolepis inconspicua</i>			
<b>Chenopodiaceae</b>				
120.	33480 <i>Dysphania pumilio</i> (Clammy Goosefoot)			
<b>Colchicaceae</b>				
121.	12770 <i>Burchardia congesta</i>			
122.	1385 <i>Burchardia multiflora</i> (Dwarf Burchardia)			
123.	1394 <i>Wurmbea dioica</i> (Early Nancy)			
124.	12072 <i>Wurmbea dioica</i> subsp. <i>alba</i>			
<b>Commelinaceae</b>				
125.	1162 <i>Cartonema philydroides</i>			
<b>Convolvulaceae</b>				
126.	6614 <i>Convolvulus remotus</i>			
<b>Crassulaceae</b>				
127.	11563 <i>Crassula colorata</i> var. <i>colorata</i>			
128.	11349 <i>Crassula decumbens</i> var. <i>decumbens</i>			
129.	3139 <i>Crassula exserta</i>			
<b>Cupressaceae</b>				
130.	36520 <i>Callitris acuminata</i> (Dwarf Cypress)			
<b>Cyperaceae</b>				
131.	744 <i>Baumea laxa</i>			
132.	760 <i>Caustis dioica</i>			
133.	763 <i>Chorizandra enodis</i> (Black Bristlerush)			
134.	768 <i>Cyathochaeta avenacea</i>			
135.	769 <i>Cyathochaeta clandestina</i>			
136.	17618 <i>Cyathochaeta equitans</i>			
137.	783 <i>Cyperus congestus</i> (Dense Flat-sedge)	Y		
138.	792 <i>Cyperus eragrostis</i> (Umbrella Sedge)	Y		
139.	894 <i>Fimbristylis velata</i>			
140.	907 <i>Gahnia trifida</i> (Coast Saw-sedge)			
141.	20200 <i>Isolepis cernua</i> var. <i>setiformis</i>			
142.	917 <i>Isolepis marginata</i> (Coarse Club-rush)			
143.	925 <i>Lepidosperma angustatum</i>			
144.	41620 <i>Lepidosperma asperatum</i>			
145.	931 <i>Lepidosperma drummondii</i>			
146.	936 <i>Lepidosperma leptostachyum</i>			
147.	940 <i>Lepidosperma pubisquamum</i>			
148.	945 <i>Lepidosperma squamatum</i>			
149.	947 <i>Lepidosperma tenue</i>			
150.	955 <i>Mesomelaena pseudostygia</i>			
151.	957 <i>Mesomelaena tetragona</i> (Semaphore Sedge)			
152.	971 <i>Schoenus andrewsii</i>			
153.	975 <i>Schoenus bifidus</i>			
154.	978 <i>Schoenus brevisetis</i>			
155.	979 <i>Schoenus caespititius</i>			
156.	982 <i>Schoenus clandestinus</i>			
157.	984 <i>Schoenus curvifolius</i>			
158.	986 <i>Schoenus efoliatus</i>			
159.	991 <i>Schoenus grammatophyllus</i>			
160.	17606 <i>Schoenus griffinianus</i>		P3	
161.	996 <i>Schoenus laevigatus</i>			
162.	998 <i>Schoenus latitans</i>			
163.	1002 <i>Schoenus nanus</i> (Tiny Bog Rush)			
164.	1007 <i>Schoenus pedicellatus</i>			
165.	1008 <i>Schoenus pennisetis</i>			

Name ID	Species Name	Naturalised	Conservation Code	<sup>1</sup> Endemic To Query Area
			P3	
166.	1009 <i>Schoenus pleiostemoneus</i>			
167.	1011 <i>Schoenus rigens</i>			
168.	1013 <i>Schoenus sculptus</i> ( <i>Gimlet Bog-rush</i> )			
169.	1016 <i>Schoenus subbarbatus</i> ( <i>Bearded Bog-rush</i> )			
170.	1017 <i>Schoenus subbulbosus</i>			
171.	1019 <i>Schoenus subflavus</i> ( <i>Yellow Bog-rush</i> )			
172.	1020 <i>Schoenus sublateralis</i>			
173.	1026 <i>Schoenus unispiculatus</i>			
174.	1034 <i>Tetraria capillaris</i> ( <i>Hair Sedge</i> )			
175.	1036 <i>Tetraria octandra</i>			
176.	43207 <i>Tricostularia exsul</i>			
<b>Dasypogonaceae</b>				
177.	1213 <i>Calectasia cyanea</i> ( <i>Blue Tinsel Lily</i> )		T	
178.	19309 <i>Calectasia narragara</i>			
179.	1218 <i>Dasypogon bromeliifolius</i> ( <i>Pineapple Bush</i> )			
180.	1220 <i>Dasypogon obliquifolius</i>			
181.	1221 <i>Kingia australis</i> ( <i>Kingia, Pulonok</i> )			
<b>Dicranaceae</b>				
182.	32461 <i>Campylopus bicolor</i> var. <i>bicolor</i>			
183.	32338 <i>Campylopus introflexus</i>	Y		
<b>Dilleniaceae</b>				
184.	5108 <i>Hibbertia acerosa</i> ( <i>Needle Leaved Guinea Flower</i> )			
185.	5112 <i>Hibbertia aurea</i>			
186.	5114 <i>Hibbertia commutata</i>			
187.	19778 <i>Hibbertia glomerata</i> subsp. <i>darlingensis</i>			
188.	5134 <i>Hibbertia huegelii</i>			
189.	5135 <i>Hibbertia hypericoides</i> ( <i>Yellow Buttercups</i> )			
190.	5153 <i>Hibbertia pachyrrhiza</i>			
191.	5169 <i>Hibbertia serrata</i> ( <i>Serrate Leaved Guinea Flower</i> )			
192.	5171 <i>Hibbertia spicata</i>			
193.	11481 <i>Hibbertia spicata</i> subsp. <i>spicata</i>			
194.	5173 <i>Hibbertia subvaginata</i>			
<b>Dioscoreaceae</b>				
195.	1509 <i>Dioscorea hastifolia</i> ( <i>Warrine, Waram</i> )			
<b>Ditrichaceae</b>				
196.	32347 <i>Ditrichum difficile</i>			
197.	32351 <i>Eccremidium pulchellum</i>			
<b>Droseraceae</b>				
198.	3092 <i>Drosera bulbosa</i> ( <i>Red-leaved Sundew</i> )			
199.	13204 <i>Drosera callistos</i>			
200.	3095 <i>Drosera erythrorhiza</i> ( <i>Red Ink Sundew</i> )			
201.	13217 <i>Drosera erythrorhiza</i> subsp. <i>erythrorhiza</i>			
202.	3098 <i>Drosera glanduligera</i> ( <i>Pimpernel Sundew</i> )			
203.	3106 <i>Drosera macrantha</i> ( <i>Bridal Rainbow</i> )			
204.	14298 <i>Drosera macrantha</i> subsp. <i>macrantha</i>			
205.	3109 <i>Drosera menziesii</i> ( <i>Pink Rainbow</i> )			
206.	13216 <i>Drosera menziesii</i> subsp. <i>penicillaris</i>			
207.	15710 <i>Drosera miniata</i> ( <i>Orange Sundew</i> )			
208.	3118 <i>Drosera pallida</i> ( <i>Pale Rainbow</i> )			
209.	29178 <i>Drosera porrecta</i>			
210.	3125 <i>Drosera pycnoblata</i> ( <i>Pearly Sundew</i> )			
211.	8911 <i>Drosera rosulata</i>			
212.	3131 <i>Drosera stolonifera</i> ( <i>Leafy Sundew</i> )			
213.	3135 <i>Drosera zonaria</i> ( <i>Painted Sundew</i> )			
<b>Elaeocarpaceae</b>				
214.	4524 <i>Platytheca galioides</i>			
215.	4535 <i>Tetradthea hirsuta</i> ( <i>Black Eyed Susan</i> )			
216.	4537 <i>Tetradthea nuda</i>			
217.	14333 <i>Tetradthea</i> sp. <i>Granite</i> ( <i>S. Patrick SP1224</i> )		P3	
<b>Ericaceae</b>				
218.	6300 <i>Andersonia aristata</i> ( <i>Rice Flower</i> )			
219.	6312 <i>Andersonia involucrata</i>			
220.	6314 <i>Andersonia lehmanniana</i>			
221.	11471 <i>Andersonia lehmanniana</i> subsp. <i>lehmanniana</i>			
222.	6323 <i>Astroloma ciliatum</i> ( <i>Candle Cranberry</i> )			

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223.	6334 <i>Astroloma pallidum</i> (Kick Bush)			
224.	6337 <i>Astroloma stomarrhena</i> (Red Swamp Cranberry)			
225.	6339 <i>Astroloma xerophyllum</i>			
226.	6347 <i>Conostephium minus</i> (Pink-tipped Pearl flower)			
227.	6348 <i>Conostephium pendulum</i> (Pearl Flower)			
228.	6349 <i>Conostephium preissii</i>			
229.	6367 <i>Leucopogon capitellatus</i>			
230.	6374 <i>Leucopogon conostephioides</i>			
231.	6397 <i>Leucopogon glaucifolius</i>			
232.	6427 <i>Leucopogon parviflorus</i> (Coast Beard-heath)			
233.	6436 <i>Leucopogon propinquus</i>			
234.	6439 <i>Leucopogon pulchellus</i> (Beard-heath)			
235.	6444 <i>Leucopogon sprengeloides</i>			
236.	40803 <i>Leucopogon squarrosus</i> subsp. <i>squarrosus</i>			
237.	6456 <i>Lysinema ciliatum</i> (Curry Flower)			
238.	34736 <i>Lysinema pentapetalum</i>			
239.	6476 <i>Styphelia tenuiflora</i> (Common Pinheath)			

### Euphorbiaceae

240.	4598 <i>Beyeria lechenaultii</i> (Pale Turpentine Bush)			
241.	4638 <i>Euphorbia peplus</i> (Petty Spurge)	Y		
242.	4662 <i>Monotaxis grandiflora</i> (Diamond of the Desert)			
243.	19585 <i>Monotaxis grandiflora</i> var. <i>grandiflora</i>			
244.	4713 <i>Stachystemon axillaris</i> (Leafy Stachystemon)			
245.	4716 <i>Stachystemon vermicularis</i>			

### Fabaceae

246.	15429 <i>Acacia alata</i> var. <i>alata</i>			
247.	3219 <i>Acacia anomala</i> (Grass Wattle)		T	
248.	3220 <i>Acacia aphylla</i> (Leafless Rock Wattle)		T	
249.	15466 <i>Acacia applanata</i>			
250.	15469 <i>Acacia barbinervis</i> subsp. <i>barbinervis</i>			
251.	3307 <i>Acacia divergens</i>			
252.	11229 <i>Acacia drummondii</i> subsp. <i>affinis</i>		P3	
253.	3323 <i>Acacia ericifolia</i>			
254.	3331 <i>Acacia extensa</i> (Wiry Wattle)			
255.	3382 <i>Acacia incrassata</i>			
256.	15721 <i>Acacia lasiocarpa</i> var. <i>sedifolia</i>			
257.	3454 <i>Acacia nervosa</i> (Rib Wattle)			
258.	3464 <i>Acacia obovata</i>			
259.	3502 <i>Acacia pulchella</i> (Prickly Moses)			
260.	15481 <i>Acacia pulchella</i> var. <i>glaberrima</i>			
261.	15483 <i>Acacia pulchella</i> var. <i>pulchella</i>			
262.	3504 <i>Acacia pycnantha</i> (Golden Wattle)	Y		
263.	3527 <i>Acacia saligna</i> (Orange Wattle, Kudjong)			
264.	3541 <i>Acacia sessilis</i>			
265.	3574 <i>Acacia teretifolia</i>			
266.	3591 <i>Acacia urophylla</i>			
267.	3602 <i>Acacia willdenowiana</i> (Grass Wattle)			
268.	3710 <i>Bossiaea eriocarpa</i> (Common Brown Pea)			
269.	3714 <i>Bossiaea ornata</i> (Broad Leaved Brown Pea)			
270.	18156 <i>Chamaecytisus palmensis</i> (Tagasaste)	Y		
271.	8971 <i>Chorizema cordatum</i>			
272.	3753 <i>Chorizema dicksonii</i> (Yellow-eyed Flame Pea)			
273.	19861 <i>Cristonia biloba</i>			
274.	35838 <i>Cristonia biloba</i> subsp. <i>biloba</i>			
275.	17368 <i>Crotalaria agatiflora</i> subsp. <i>agatiflora</i>	Y		
276.	3793 <i>Daviesia angulata</i>			
277.	3799 <i>Daviesia cordata</i> (Bookleaf)			
278.	3805 <i>Daviesia decurrens</i> (Prickly Bitter-pea)			
279.	19747 <i>Daviesia decurrens</i> subsp. <i>decurrens</i>			
280.	3807 <i>Daviesia divaricata</i> (Marno)			
281.	18560 <i>Daviesia divaricata</i> subsp. <i>divaricata</i>			
282.	3815 <i>Daviesia horrida</i> (Prickly Bitter-pea)			
283.	3824 <i>Daviesia nudiflora</i>			
284.	16585 <i>Daviesia nudiflora</i> subsp. <i>nudiflora</i>			
285.	3832 <i>Daviesia physodes</i>			
286.	3833 <i>Daviesia podophylla</i>			
287.	3834 <i>Daviesia polyphylla</i>			
288.	3835 <i>Daviesia preissii</i>			
289.	3845 <i>Daviesia triflora</i>			

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290.	3872 <i>Euchilopsis linearis</i> (Swamp Pea)			
291.	3887 <i>Gastrolobium acutum</i>			
292.	3895 <i>Gastrolobium calycinum</i> (York Road Poison)			
293.	20475 <i>Gastrolobium capitatum</i>			
294.	20513 <i>Gastrolobium dilatatum</i>			
295.	3912 <i>Gastrolobium oxylobioides</i> (Champion Bay Poison)			
296.	3923 <i>Gastrolobium spathulatum</i> (Poison Bush)			
297.	3936 <i>Genista linifolia</i> (Flaxleaf Broom)	Y		
298.	10909 <i>Gompholobium confertum</i>			
299.	3950 <i>Gompholobium knightianum</i>			
300.	3951 <i>Gompholobium marginatum</i>			
301.	3954 <i>Gompholobium polymorphum</i>			
302.	3955 <i>Gompholobium preissii</i>			
303.	3956 <i>Gompholobium shuttleworthii</i>			
304.	3957 <i>Gompholobium tomentosum</i> (Hairy Yellow Pea)			
305.	3964 <i>Hovea chorizemifolia</i> (Holly-leaved Hovea)			
306.	3966 <i>Hovea pungens</i> (Devil's Pins, Puyenak)			
307.	3968 <i>Hovea trisperma</i> (Common Hovea)			
308.	12907 <i>Hovea trisperma</i> var. <i>grandiflora</i>			
309.	12859 <i>Hovea trisperma</i> var. <i>trisperma</i>			
310.	3992 <i>Isotropis cuneifolia</i> (Granny Bonnets)			
311.	19700 <i>Isotropis cuneifolia</i> subsp. <i>cuneifolia</i>			
312.	3997 <i>Jacksonia alata</i>			
313.	4010 <i>Jacksonia floribunda</i> (Holly Pea)			
314.	4018 <i>Jacksonia lehmannii</i>			
315.	4025 <i>Jacksonia restioides</i>			
316.	4027 <i>Jacksonia sericea</i> (Waldjumi)		P4	
317.	4029 <i>Jacksonia sternbergiana</i> (Stinkwood, Kapur)			
318.	4037 <i>Kennedia coccinea</i> (Coral Vine)			
319.	4044 <i>Kennedia prostrata</i> (Scarlet Runner)			
320.	4045 <i>Kennedia stirlingii</i> (Bushy Kennedia)			
321.	11289 <i>Labichea lanceolata</i> subsp. <i>lanceolata</i>			
322.	3669 <i>Labichea punctata</i> (Lance-leaved Cassia)			
323.	4063 <i>Lotus uliginosus</i> (Greater Lotus)	Y		
324.	4065 <i>Lupinus angustifolius</i> (Narrowleaf Lupin)	Y		
325.	4067 <i>Lupinus luteus</i> (Yellow Lupin)	Y		
326.	4172 <i>Pultenaea ericifolia</i>			
327.	4205 <i>Sphaerolobium linophyllum</i>			
328.	4206 <i>Sphaerolobium macranthum</i>			
329.	4207 <i>Sphaerolobium medium</i>			
330.	4251 <i>Templetonia drummondii</i>			
331.	17145 <i>Trifolium angustifolium</i> var. <i>angustifolium</i>	Y		
332.	4291 <i>Trifolium arvense</i> (Hare's Foot Clover)	Y		
333.	4292 <i>Trifolium campestre</i> (Hop Clover)	Y		
334.	17763 <i>Trifolium campestre</i> var. <i>campestre</i> (Hop Clover)	Y		

#### Funariaceae

335. 32370 *Funaria hygrometrica*

#### Gentianaceae

336. 6539 *Centaurium erythraea* (Common Centaury)

337. 6542 *Centaurium tenuiflorum*

338. 6543 *Cicendia filiformis* (Slender Cicendia)

#### Geraniaceae

339. 4335 *Erodium cygnorum* (Blue Heronsbill)

#### Goodeniaceae

340. 7420 *Dampiera alata* (Winged-stem Dampiera)

341. 7454 *Dampiera linearis* (Common Dampiera)

342. 29362 *Goodenia coerulea*

343. 12520 *Goodenia fasciculata*

344. 7568 *Lechenaultia biloba* (Blue Leschenaultia)

345. 7572 *Lechenaultia expansa*

346. 7602 *Scaevola calliptera*

347. 7603 *Scaevola canescens* (Grey Scaevola)

348. 7613 *Scaevola glandulifera* (Viscid Hand-flower)

349. 7635 *Scaevola pilosa* (Hairy Fan-flower)

350. 7636 *Scaevola platyphylla* (Broad-leaved Fanflower)

351. 12585 *Scaevola repens*

352. 13182 *Scaevola repens* var. *repens*

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<b>Haemodoraceae</b>				
353.	11470 <i>Anigozanthos bicolor</i> subsp. <i>bicolor</i>			
354.	1409 <i>Anigozanthos humilis</i> (Catspaw)			
355.	1411 <i>Anigozanthos manglesii</i> (Mangles Kangaroo Paw, Kurulbrang)			
356.	11261 <i>Anigozanthos manglesii</i> subsp. <i>manglesii</i>			
357.	1417 <i>Blanca canescens</i> (Winter Bell)			
358.	1418 <i>Conostylis aculeata</i> (Prickly Conostylis)			
359.	1420 <i>Conostylis androstemma</i> (Trumpets)			
360.	1423 <i>Conostylis aurea</i> (Golden Conostylis)			
361.	1429 <i>Conostylis caricina</i>			
362.	1436 <i>Conostylis juncea</i>			
363.	1454 <i>Conostylis setigera</i> (Bristly Cottonhead)			
364.	11597 <i>Conostylis setigera</i> subsp. <i>setigera</i>			
365.	1455 <i>Conostylis setosa</i> (White Cottonhead)			
366.	1464 <i>Haemodorum brevisepalum</i>			
367.	1465 <i>Haemodorum discolor</i>			
368.	1468 <i>Haemodorum laxum</i>			
369.	1469 <i>Haemodorum loratum</i>		P3	
370.	1470 <i>Haemodorum paniculatum</i> (Mardja)			
371.	1472 <i>Haemodorum simplex</i>			
372.	1474 <i>Haemodorum sparsiflorum</i>			
373.	1475 <i>Haemodorum spicatum</i> (Mardja)			
374.	1478 <i>Phlebocarya ciliata</i>			
375.	1479 <i>Phlebocarya filifolia</i>			
376.	1482 <i>Tribonanthes brachypetala</i>			
377.	1483 <i>Tribonanthes longipetala</i>			
<b>Haloragaceae</b>				
378.	6149 <i>Gonocarpus cordiger</i>			
379.	6161 <i>Gonocarpus pithyoides</i>			
<b>Hemerocallidaceae</b>				
380.	23474 <i>Agrostocrinum hirsutum</i>			
381.	1261 <i>Agrostocrinum scabrum</i> (Blue Grass Lily)			
382.	1264 <i>Arnocrinum preissii</i>			
383.	1276 <i>Caesia micrantha</i> (Pale Grass Lily)			
384.	1277 <i>Caesia occidentalis</i>			
385.	1259 <i>Dianella revoluta</i> (Blueberry Lily)			
386.	11636 <i>Dianella revoluta</i> var. <i>divaricata</i>			
387.	1298 <i>Johnsonia pubescens</i> (Pipe Lily)			
388.	19632 <i>Johnsonia pubescens</i> subsp. <i>pubescens</i>			
389.	1260 <i>Stypandra glauca</i> (Blind Grass)			
390.	1361 <i>Tricoryne elatior</i> (Yellow Autumn Lily)			
391.	1363 <i>Tricoryne tenella</i>			
<b>Hydrocharitaceae</b>				
392.	168 <i>Ottelia ovalifolia</i> (Swamp Lily)			
<b>Hypoxidaceae</b>				
393.	43760 <i>Pauridia occidentalis</i>			
394.	43762 <i>Pauridia occidentalis</i> var. <i>quadriloba</i>			
<b>Iridaceae</b>				
395.	18279 <i>Babiana angustifolia</i>	Y		
396.	18392 <i>Freesia alba</i> x <i>leichtlinii</i>	Y		
397.	18298 <i>Gladiolus carneus</i>	Y		
398.	1520 <i>Gladiolus caryophyllaceus</i> (Wild Gladiolus)	Y		
399.	1526 <i>Hesperantha falcata</i>	Y		
400.	1533 <i>Ixia paniculata</i>	Y		
401.	19179 <i>Moraea flaccida</i> (One-leaf Cape Tulip)	Y		
402.	11749 <i>Orthrosanthus laxus</i> var. <i>laxus</i> (Morning Iris)			
403.	1546 <i>Patersonia juncea</i> (Rush Leaved Patersonia)			
404.	1550 <i>Patersonia occidentalis</i> (Purple Flag, Koma)			
405.	30472 <i>Patersonia occidentalis</i> var. <i>occidentalis</i>			
406.	1551 <i>Patersonia pygmaea</i> (Pygmy Patersonia)			
407.	14433 <i>Patersonia rudis</i> subsp. <i>rudis</i>			
408.	1556 <i>Romulea rosea</i> (Guildford Grass)	Y		
409.	1558 <i>Sparaxis bulbifera</i>	Y		
410.	18118 <i>Watsonia meriana</i> var. <i>meriana</i>	Y		
<b>Juncaceae</b>				
411.	1180 <i>Juncus capitatus</i> (Capitate Rush)	Y		
412.	11922 <i>Juncus kraussii</i> subsp. <i>australiensis</i>			



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<b>Juncaginaceae</b>				
413.	40660 <i>Cycnogeton huegelii</i>			
<b>Lamiaceae</b>				
414.	6836 <i>Hemiandra incana</i>			
415.	6838 <i>Hemiandra linearis</i> (Speckled Snakebush)			
416.	6839 <i>Hemiandra pungens</i> (Snakebush)			
417.	6856 <i>Hemigenia incana</i> (Silky Hemigenia)			
418.	41020 <i>Hemiphora bartlingii</i> (Woolly Dragon)			
419.	38323 <i>Lavandula stoechas</i> subsp. <i>stoechas</i>	Y		
420.	6930 <i>Stachys arvensis</i> (Staggerweed)	Y		
<b>Lauraceae</b>				
421.	2951 <i>Cassytha flava</i> (Dodder Laurel)			
422.	2952 <i>Cassytha glabella</i> (Tangled Dodder Laurel)			
423.	11501 <i>Cassytha glabella</i> forma <i>casuarinae</i>			
424.	2956 <i>Cassytha pomiformis</i> (Dodder Laurel)			
425.	2957 <i>Cassytha racemosa</i> (Dodder Laurel)			
<b>Lentibulariaceae</b>				
426.	7157 <i>Utricularia violacea</i> (Violet Bladderwort)			
<b>Linaceae</b>				
427.	4363 <i>Linum trigynum</i> (French Flax)	Y		
<b>Loganiaceae</b>				
428.	16825 <i>Phyllangium divergens</i>			
<b>Loranthaceae</b>				
429.	2383 <i>Amyema preissii</i> (Wireleaf Mistletoe)			
430.	2401 <i>Nuytsia floribunda</i> (Christmas Tree, Mudja)			
<b>Lythraceae</b>				
431.	5281 <i>Lythrum hyssopifolia</i> (Lesser Loosestrife)	Y		
<b>Malvaceae</b>				
432.	5013 <i>Guichenotia micrantha</i> (Small Flowered Guichenotia)			
433.	5025 <i>Lasiopetalum bracteatum</i> (Helena Velvet Bush)		P4	
434.	45081 <i>Lasiopetalum glutinosum</i> subsp. <i>glutinosum</i>		P3	
435.	5080 <i>Thomasia foliosa</i>			
436.	5084 <i>Thomasia grandiflora</i> (Large Flowered Thomasia)			
437.	5087 <i>Thomasia macrocarpa</i> (Large Fruited Thomasia)			
438.	5105 <i>Thomasia triphylla</i>			
<b>Menyanthaceae</b>				
439.	36160 <i>Liparophyllum capitatum</i>			
440.	36200 <i>Ornduffia submersa</i>		P4	
<b>Molluginaceae</b>				
441.	2839 <i>Macarthuria australis</i>			
442.	17106 <i>Macarthuria keigheryi</i>		T	
<b>Myrtaceae</b>				
443.	20350 <i>Astartea affinis</i>			
444.	36441 <i>Babingtonia camphorosmae</i> (Camphor Myrtle)			
445.	5390 <i>Beaufortia purpurea</i>		P3	
446.	5395 <i>Callistemon phoeniceus</i> (Lesser Bottlebrush, Dubarda)			
447.	5396 <i>Calothamnus accedens</i>		P4	
448.	5426 <i>Calothamnus quadrifidus</i> (One-sided Bottlebrush, Kwowdjard)			
449.	35816 <i>Calothamnus quadrifidus</i> subsp. <i>quadrifidus</i>			
450.	5429 <i>Calothamnus sanguineus</i> (Silky-leaved Blood flower, Pindak)			
451.	5441 <i>Calytrix aurea</i>			
452.	5458 <i>Calytrix flavescens</i> (Summer Starflower)			
453.	5485 <i>Calytrix variabilis</i>			
454.	5502 <i>Conothamnus trinervis</i>			
455.	17104 <i>Corymbia calophylla</i> (Marri)			
456.	5505 <i>Darwinia apiculata</i> (Scarp Darwinia)		T	
457.	5508 <i>Darwinia citriodora</i> (Lemon-scented Darwinia)			
458.	5531 <i>Darwinia thymoides</i>			
459.	5540 <i>Eremaea fimbriata</i>			
460.	5541 <i>Eremaea pauciflora</i>			
461.	14104 <i>Eremaea pauciflora</i> var. <i>pauciflora</i>			
462.	5688 <i>Eucalyptus laeliae</i> (Darling Range Ghost Gum)			
463.	5708 <i>Eucalyptus marginata</i> (Jarrah, Djara)			
464.	13547 <i>Eucalyptus marginata</i> subsp. <i>marginata</i> (Jarrah)			

Name ID	Species Name	Naturalised	Conservation Code	<sup>1</sup> Endemic To Query Area
465.	13548 <i>Eucalyptus marginata</i> subsp. <i>thalassica</i> (Blue-leaved Jarrah)			
466.	13511 <i>Eucalyptus rudis</i> subsp. <i>rudis</i>			
467.	5790 <i>Eucalyptus todtiana</i> (Coastal Blackbutt)			
468.	5797 <i>Eucalyptus wandoo</i> (Wandoo, Wondu)			
469.	5817 <i>Hypocalymma angustifolium</i> (White Myrtle, Kudjid)			
470.	35074 <i>Hypocalymma angustifolium</i> subsp. <i>Dandaragan plateau</i> (S. Patrick 702A)			
471.	5825 <i>Hypocalymma robustum</i> (Swan River Myrtle)			
472.	5847 <i>Leptospermum erubescens</i> (Roadside Teatree)			
473.	5857 <i>Leptospermum spinescens</i>			
474.	13273 <i>Melaleuca incana</i> subsp. <i>incana</i>			
475.	5926 <i>Melaleuca lateritia</i> (Robin Redbreast Bush)			
476.	18394 <i>Melaleuca parviceps</i>			
477.	5958 <i>Melaleuca radula</i> (Graceful Honeymyrtle)			
478.	5959 <i>Melaleuca raphiophylla</i> (Swamp Paperbark)			
479.	5961 <i>Melaleuca scabra</i> (Rough Honeymyrtle, Wurru Bush)			
480.	5964 <i>Melaleuca seriata</i>			
481.	5983 <i>Melaleuca trichophylla</i>			
482.	37683 <i>Melaleuca viminalis</i>		P2	
483.	6019 <i>Rinzia communis</i>			
484.	34296 <i>Rinzia</i> sp. <i>Darling Range</i> (F. Hort 2040)			
485.	6033 <i>Scholtzia involucrata</i> (Spiked Scholtzia)			
486.	20135 <i>Taxandria linearifolia</i>			
487.	15431 <i>Verticordia acerosa</i> var. <i>acerosa</i>			
488.	15432 <i>Verticordia densiflora</i> var. <i>densiflora</i>			
489.	6077 <i>Verticordia drummondii</i> (Drummond's Featherflower)			
490.	6088 <i>Verticordia huegelii</i> (Variegated Featherflower)			
491.	15433 <i>Verticordia huegelii</i> var. <i>huegelii</i>			
492.	14714 <i>Verticordia lindleyi</i> subsp. <i>lindleyi</i>		P4	
493.	6107 <i>Verticordia pennigera</i>			
<b>Olacaceae</b>				
494.	2365 <i>Olax benthamiana</i>			
495.	2367 <i>Olax scalariformis</i>			
<b>Oleaceae</b>				
496.	11937 <i>Olea europaea</i> subsp. <i>europaea</i>	Y		
<b>Onagraceae</b>				
497.	44680 <i>Ludwigia repens</i>	Y		
<b>Orchidaceae</b>				
498.	15330 <i>Caladenia arenicola</i>			
499.	1586 <i>Caladenia discoidea</i> (Dancing Orchid)			
500.	1592 <i>Caladenia flava</i> (Cowslip Orchid)			
501.	15348 <i>Caladenia flava</i> subsp. <i>flava</i>			
502.	17980 <i>Caladenia hiemalis</i>			
503.	15354 <i>Caladenia hirta</i> subsp. <i>hirta</i>			
504.	15361 <i>Caladenia longicauda</i> subsp. <i>calcigena</i>			
505.	15365 <i>Caladenia longicauda</i> subsp. <i>longicauda</i>			
506.	1604 <i>Caladenia macrostylis</i> (Leaping Spider Orchid)			
507.	15503 <i>Caladenia paludosa</i>			
508.	15377 <i>Caladenia reptans</i> subsp. <i>reptans</i>			
509.	18019 <i>Caladenia vulgata</i>			
510.	12943 <i>Diuris brumalis</i>			
511.	11049 <i>Diuris corymbosa</i>			
512.	1634 <i>Diuris laxiflora</i> (Bee Orchid)			
513.	12939 <i>Diuris magnifica</i>			
514.	1644 <i>Elythranthera emarginata</i> (Pink Enamel Orchid)			
515.	15412 <i>Eriochilus dilatatus</i> subsp. <i>multiflorus</i>			
516.	15414 <i>Eriochilus helonomos</i>			
517.	15415 <i>Eriochilus scaber</i> subsp. <i>scaber</i>			
518.	1656 <i>Lyperanthus serratus</i> (Rattle Beak Orchid)			
519.	1658 <i>Microtis atrata</i> (Swamp Mignonette Orchid)			
520.	15419 <i>Microtis media</i> subsp. <i>media</i>			
521.	23500 <i>Paracaleana hortiorum</i>			
522.	20460 <i>Pheladenia deformis</i>			
523.	1671 <i>Prasophyllum elatum</i> (Tall Leek Orchid)			
524.	1672 <i>Prasophyllum fimbria</i> (Fringed Leek Orchid)			
525.	1674 <i>Prasophyllum giganteum</i> (Bronze Leek Orchid)			
526.	1676 <i>Prasophyllum hians</i> (Yawning Leek Orchid)			
527.	1680 <i>Prasophyllum parvifolium</i> (Autumn Leek Orchid)			
528.	10853 <i>Prasophyllum plumiforme</i>			

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529.	1686 <i>Pterostylis barbata</i> (Bird Orchid)			
530.	1693 <i>Pterostylis recurva</i> (Jug Orchid)			
531.	12217 <i>Pterostylis sanguinea</i>			
532.	16367 <i>Pyrorchis nigricans</i> (Red beaks, Elephants ears)			
533.	1701 <i>Thelymitra antennifera</i> (Vanilla Orchid)			
534.	10856 <i>Thelymitra benthamiana</i> (Leopard Orchid)			
535.	1705 <i>Thelymitra crinita</i> (Blue Lady Orchid)			
536.	20729 <i>Thelymitra magnifica</i> (Crystal Brook Star Orchid)		P1	
537.	10862 <i>Thelymitra stellata</i> (Star Orchid)		T	
538.	1717 <i>Thelymitra variegata</i> (Queen of Sheba)		P3	
539.	20731 <i>Thelymitra vulgaris</i>			
<b>Orobanchaceae</b>				
540.	15037 <i>Bartsia trixago</i>	Y		
541.	7122 <i>Orobanche minor</i> (Lesser Broomrape)	Y		
542.	7089 <i>Parentucellia latifolia</i> (Common Bartsia)	Y		
<b>Oxalidaceae</b>				
543.	30375 <i>Oxalis exilis</i>			
544.	4352 <i>Oxalis glabra</i>	Y		
545.	4354 <i>Oxalis incamata</i>	Y		
546.	4355 <i>Oxalis perennans</i>			
<b>Papaveraceae</b>				
547.	31532 <i>Fumaria muralis</i> subsp. <i>muralis</i>	Y		
<b>Philydraceae</b>				
548.	1172 <i>Philydrella drummondii</i>			
549.	1173 <i>Philydrella pygmaea</i> (Butterfly Flowers)			
<b>Phyllanthaceae</b>				
550.	4675 <i>Phyllanthus calycinus</i> (False Boronia)			
551.	4690 <i>Poranthera huegelii</i>			
552.	4691 <i>Poranthera microphylla</i> (Small Poranthera)			
<b>Phytolaccaceae</b>				
553.	2793 <i>Phytolacca octandra</i> (Red Ink Plant)	Y		
<b>Pittosporaceae</b>				
554.	25788 <i>Billardiera fraseri</i> (Elegant Pronaya)			
555.	3169 <i>Cheiranthra preissiana</i>			
556.	19421 <i>Marianthus bicolor</i> (Painted Marianthus)			
557.	17635 <i>Marianthus drummondianus</i>			
558.	17633 <i>Marianthus erubescens</i>			
<b>Plantaginaceae</b>				
559.	4717 <i>Callitriche stagnalis</i> (Common Starwort)	Y		
560.	7085 <i>Misopates orontium</i> (Lesser Snapdragon)	Y		
<b>Poaceae</b>				
561.	184 <i>Aira caryophyllea</i> (Silvery Hairgrass)	Y		
562.	185 <i>Aira cupaniana</i> (Silvery Hairgrass)	Y		
563.	197 <i>Amphipogon debilis</i>			
564.	199 <i>Amphipogon strictus</i> (Greybeard Grass)			
565.	200 <i>Amphipogon turbinatus</i>			
566.	17233 <i>Austrostipa campylachne</i>			
567.	17234 <i>Austrostipa compressa</i>			
568.	17237 <i>Austrostipa elegantissima</i>			
569.	17241 <i>Austrostipa hemipogon</i>			
570.	17257 <i>Austrostipa variabilis</i>			
571.	231 <i>Avellinia michelii</i>	Y		
572.	233 <i>Avena barbata</i> (Bearded Oat)	Y		
573.	8661 <i>Brachypodium distachyon</i> (False Brome)	Y		
574.	244 <i>Briza maxima</i> (Blowfly Grass)	Y		
575.	245 <i>Briza minor</i> (Shivery Grass)	Y		
576.	41563 <i>Cenchrus purpureus</i> (Elephant Grass)	Y		
577.	306 <i>Dichelachne crinita</i> (Longhair Plumegrass)			
578.	347 <i>Ehrharta calycina</i> (Perennial Veldt Grass)	Y		
579.	349 <i>Ehrharta longiflora</i> (Annual Veldt Grass)	Y		
580.	376 <i>Eragrostis curvula</i> (African Lovegrass)	Y		
581.	379 <i>Eragrostis elongata</i> (Clustered Lovegrass)			
582.	431 <i>Festuca pratensis</i> (Meadow Fescue)	Y		
583.	434 <i>Gastridium phleoides</i> (Nitgrass)	Y		
584.	452 <i>Hyparrhenia hirta</i> (Tambookie Grass)	Y		
585.	20019 <i>Lachnagrostis filiformis</i>			

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586.	14985 <i>Melinis repens</i>	Y		
587.	485 <i>Microlaena stipoides</i> (Weeping Grass)			
588.	492 <i>Neurachne alopecuroidea</i> (Foxtail Mulga Grass)			
589.	527 <i>Paspalum dilatatum</i>	Y		
590.	532 <i>Paspalum urvillei</i> (Vasey Grass)	Y		
591.	40422 <i>Pentameris pallida</i>	Y		
592.	573 <i>Poa drummondiana</i> (Knotted Poa)			
593.	40426 <i>Rytidosperma occidentale</i>			
594.	40427 <i>Rytidosperma setaceum</i>			
595.	636 <i>Stenotaphrum secundatum</i> (Buffalo Grass)	Y		
596.	667 <i>Tetrarrhena laevis</i> (Forrest Ricegrass)			
597.	11112 <i>Tribolium uniolae</i>	Y		
598.	722 <i>Vulpia bromoides</i> (Squirrel Tail Fescue)	Y		
599.	724 <i>Vulpia myuros</i> (Rat's Tail Fescue)	Y		
600.	12052 <i>Vulpia myuros forma megalura</i>	Y		
601.	33101 <i>Vulpia myuros forma myuros</i>	Y		

### Polygalaceae

602.	4550 <i>Comesperma calymega</i> (Blue-spike Milkwort)			
603.	4551 <i>Comesperma ciliatum</i>			

### Polygonaceae

604.	2412 <i>Muehlenbeckia adpressa</i> (Climbing Lignum)			
605.	16984 <i>Persicaria lapathifolia</i>	Y		
606.	16983 <i>Persicaria maculosa</i>	Y		

### Portulacaceae

607.	2848 <i>Calandrinia corrigioloides</i> (Strap Purslane)			
608.	16365 <i>Calandrinia</i> sp. Kenwick (G.J. Keighery 10905)			

### Pottiaceae

609.	32315 <i>Barbula calycina</i>			
610.	32438 <i>Syntrichia pagorum</i>			

### Primulaceae

611.	36375 <i>Lysimachia arvensis</i> (Pimpernel)	Y		
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### Proteaceae

612.	1775 <i>Adenanthos cygnorum</i> (Common Woollybush)			
613.	32682 <i>Banksia armata</i> var. <i>armata</i>			
614.	1800 <i>Banksia attenuata</i> (Slender Banksia, Piara)			
615.	32576 <i>Banksia dallanneyi</i> (Couch Honeypot)			
616.	32580 <i>Banksia dallanneyi</i> var. <i>dallanneyi</i>			
617.	32577 <i>Banksia dallanneyi</i> var. <i>melliculca</i>			
618.	1819 <i>Banksia grandis</i> (Bull Banksia, Pulgarla)			
619.	1822 <i>Banksia ilicifolia</i> (Holly-leaved Banksia)			
620.	1823 <i>Banksia incana</i>			
621.	33399 <i>Banksia incana</i> var. <i>incana</i>			
622.	1834 <i>Banksia menziesii</i> (Firewood Banksia)			
623.	32202 <i>Banksia nivea</i> (Honeypot Dryandra, Pudjarn)			
624.	32138 <i>Banksia pteridifolia</i> subsp. <i>vernalis</i>		P3	
625.	32080 <i>Banksia sessilis</i> var. <i>sessilis</i>			
626.	1852 <i>Banksia telmatiaea</i> (Swamp Fox Banksia)			
627.	15607 <i>Conospermum acerosum</i> subsp. <i>acerosum</i>			
628.	15041 <i>Conospermum canaliculatum</i>			
629.	1875 <i>Conospermum huegelii</i> (Slender Smokebush)			
630.	15520 <i>Conospermum stoechadis</i> subsp. <i>sclerophyllum</i>			
631.	15611 <i>Conospermum stoechadis</i> subsp. <i>stoechadis</i> (Common Smokebush)			
632.	1885 <i>Conospermum triplinervium</i> (Tree Smokebush)			
633.	13999 <i>Conospermum undulatum</i>		T	
634.	1964 <i>Grevillea bipinnatifida</i> (Fuchsia Grevillea)			
635.	19628 <i>Grevillea bipinnatifida</i> subsp. <i>bipinnatifida</i>			
636.	1997 <i>Grevillea endlicheriana</i> (Spindly Grevillea)			
637.	2066 <i>Grevillea pilulifera</i> (Woolly-flowered Grevillea)			
638.	2101 <i>Grevillea synapheae</i> (Catkin Grevillea)			
639.	2128 <i>Hakea amplexicaulis</i> (Prickly Hakea)			
640.	2137 <i>Hakea ceratophylla</i> (Horned Leaf Hakea)			
641.	2143 <i>Hakea conchifolia</i> (Shell-leaved Hakea)			
642.	2149 <i>Hakea cristata</i> (Snail Hakea)			
643.	2152 <i>Hakea cyclocarpa</i> (Ramshorn)			
644.	2158 <i>Hakea erinacea</i> (Hedge-hog Hakea)			
645.	2166 <i>Hakea incrassata</i> (Marble Hakea)			
646.	2175 <i>Hakea lissocarpha</i> (Honey Bush)			

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647.	2185 <i>Hakea myrtoidea</i> (Myrtle Hakea)			
648.	2197 <i>Hakea prostrata</i> (Harsh Hakea)			
649.	2203 <i>Hakea ruscifolia</i> (Candle Hakea)			
650.	31793 <i>Hakea</i> sp. Eastern coastal plain (G.J. Keighery 8014)			
651.	12234 <i>Hakea spathulata</i>			
652.	2206 <i>Hakea stenocarpa</i> (Narrow-fruited Hakea)			
653.	2212 <i>Hakea sulcata</i> (Furrowed Hakea)			
654.	2214 <i>Hakea trifurcata</i> (Two-leaf Hakea)			
655.	2215 <i>Hakea undulata</i> (Wavy-leaved Hakea)			
656.	2221 <i>Isopogon asper</i>			
657.	2228 <i>Isopogon drummondii</i>		P3	
658.	2229 <i>Isopogon dubius</i> (Pincushion Coneflower)			
659.	2237 <i>Isopogon sphaerocephalus</i> (Drumstick Isopogon)			
660.	2249 <i>Lambertia multiflora</i> (Many-flowered Honeysuckle)			
661.	14083 <i>Lambertia multiflora</i> var. <i>darlingensis</i>			
662.	2255 <i>Persoonia angustiflora</i>			
663.	2262 <i>Persoonia elliptica</i> (Spreading Snottygobble)			
664.	2273 <i>Persoonia saccata</i> (Snottygobble)			
665.	2284 <i>Petrophile biloba</i> (Granite Petrophile)			
666.	2299 <i>Petrophile linearis</i> (Pixie Mops)			
667.	2301 <i>Petrophile macrostachya</i>			
668.	2306 <i>Petrophile rigida</i>			
669.	2308 <i>Petrophile seminuda</i>			
670.	2312 <i>Petrophile striata</i>			
671.	2316 <i>Stirlingia latifolia</i> (Blueboy)			
672.	2321 <i>Synaphea acutiloba</i> (Granite Synaphea)			
673.	2323 <i>Synaphea gracillima</i>			
674.	16864 <i>Synaphea petiolaris</i> subsp. <i>petiolaris</i>			
675.	2325 <i>Synaphea pinnata</i> (Helena Synaphea)			
676.	2329 <i>Synaphea spinulosa</i>			
677.	15532 <i>Synaphea spinulosa</i> subsp. <i>spinulosa</i>			
678.	2331 <i>Xylomelum occidentale</i> (Woody Pear, Djandin)			

#### Pteridaceae

679.	31 <i>Cheilanthes austrotenuifolia</i>			
680.	34 <i>Cheilanthes distans</i> (Bristly Cloak Fern)			
681.	12818 <i>Cheilanthes sieberi</i> subsp. <i>sieberi</i>			

#### Ranunculaceae

682.	2929 <i>Clematis pubescens</i> (Common Clematis)			
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#### Restionaceae

683.	1056 <i>Alexgeorgea nitens</i>			
684.	17706 <i>Chordiflex sinuosus</i>			
685.	17692 <i>Cytogonidium leptocarpoides</i>			
686.	17663 <i>Desmocladius asper</i>			
687.	17691 <i>Desmocladius fasciculatus</i>			
688.	17838 <i>Dielsia stenostachya</i>			
689.	1070 <i>Hypolaena exsulca</i>			
690.	17841 <i>Hypolaena pubescens</i>			
691.	1075 <i>Lepidobolus preissianus</i>			
692.	18074 <i>Lepidobolus preissianus</i> subsp. <i>preissianus</i>			
693.	19241 <i>Lepyrodia curvescens</i>		P2	
694.	15562 <i>Lepyrodia riparia</i>			
695.	17747 <i>Meeboldina decipiens</i>			

#### Rhamnaceae

696.	13470 <i>Cryptandra arbutiflora</i> var. <i>arbutiflora</i>			
697.	4804 <i>Cryptandra nutans</i>			
698.	16197 <i>Stenanthemum emarginatum</i>			
699.	13475 <i>Stenanthemum humile</i>			
700.	13479 <i>Trymalium ledifolium</i> var. <i>rosmarinifolium</i>			
701.	33418 <i>Trymalium odoratissimum</i> subsp. <i>odoratissimum</i>			

#### Rubiaceae

702.	7321 <i>Galium divaricatum</i>	Y		
703.	18254 <i>Opercularia apiciflora</i>			
704.	18255 <i>Opercularia vaginata</i> (Dog Weed)			

#### Rutaceae

705.	17497 <i>Asterolasia pallida</i> subsp. <i>pallida</i>			
706.	11503 <i>Boronia crenulata</i> var. <i>crenulata</i>			
707.	4414 <i>Boronia cymosa</i> (Granite Boronia)			

Name ID	Species Name	Naturalised	Conservation Code	<sup>1</sup> Endemic To Query Area
708.	16618 <i>Boronia humifusa</i>		P1	
709.	4432 <i>Boronia ovata</i>			
710.	4438 <i>Boronia ramosa</i>			
711.	11381 <i>Boronia ramosa</i> subsp. <i>anethifolia</i>			
712.	11564 <i>Boronia ramosa</i> subsp. <i>ramosa</i>			
713.	4444 <i>Boronia tenuis</i> (Blue Boronia)		P4	
714.	18529 <i>Philotheca spicata</i> (Pepper and Salt)			
<b>Salviniaceae</b>				
715.	42902 <i>Azolla rubra</i>			
<b>Santalaceae</b>				
716.	2344 <i>Leptomeria empetriformis</i>			
<b>Sapindaceae</b>				
717.	18589 <i>Diplopeltis huegelii</i> subsp. <i>lehmannii</i>			
<b>Scrophulariaceae</b>				
718.	13405 <i>Phyllopodium cordatum</i>	Y		
<b>Sematophyllaceae</b>				
719.	32433 <i>Sematophyllum homomallum</i>			
<b>Solanaceae</b>				
720.	6983 <i>Physalis peruviana</i> (Cape Gooseberry)	Y		
<b>Stylidiaceae</b>				
721.	7676 <i>Levenhookia pusilla</i> (Midget Stylewort)			
722.	7677 <i>Levenhookia stipitata</i> (Common Stylewort)			
723.	7679 <i>Stylidium adpressum</i> (Trigger-on-stilts)			
724.	7681 <i>Stylidium affine</i> (Queen Triggerplant)			
725.	7684 <i>Stylidium amoenum</i> (Lovely Triggerplant)			
726.	30278 <i>Stylidium androsaceum</i>			
727.	30276 <i>Stylidium bicolor</i>			
728.	7693 <i>Stylidium brunonianum</i> (Pink Fountain Triggerplant)			
729.	7694 <i>Stylidium bulbiferum</i> (Circus Triggerplant)			
730.	7696 <i>Stylidium calcaratum</i> (Book Triggerplant)			
731.	7698 <i>Stylidium caricifolium</i> (Milkmaids)			
732.	7699 <i>Stylidium carnosum</i> (Fleshy-leaved Triggerplant)			
733.	7713 <i>Stylidium dichotomum</i> (Pins-and-needles)			
734.	7716 <i>Stylidium diuroides</i> (Donkey Triggerplant)			
735.	11808 <i>Stylidium diuroides</i> subsp. <i>diuroides</i>			
736.	7719 <i>Stylidium ecorne</i> (Foot Triggerplant)			
737.	7736 <i>Stylidium hispidum</i> (White Butterfly Triggerplant)			
738.	7756 <i>Stylidium longitubum</i> (Jumping Jacks)		P3	
739.	7773 <i>Stylidium petiolare</i> (Horn Triggerplant)			
740.	7774 <i>Stylidium piliferum</i> (Common Butterfly Triggerplant)			
741.	7783 <i>Stylidium pycnostachyum</i> (Downy Triggerplant)			
742.	33106 <i>Stylidium recurvum</i>			
743.	7785 <i>Stylidium repens</i> (Matted Triggerplant)			
744.	25806 <i>Stylidium scariosum</i>			
745.	7798 <i>Stylidium schoenoides</i> (Cow Kicks)			
746.	17992 <i>Stylidium</i> sp. <i>Bindoon</i> (K.F. Kenneally 11405)			
747.	25830 <i>Stylidium</i> sp. <i>Darling Range</i> (H. Bowler 371)			
748.	7803 <i>Stylidium striatum</i> (Fan-leaved Triggerplant)		P4	
749.	7806 <i>Stylidium utricularioides</i> (Pink Fan Triggerplant)			
<b>Tecophilaeaceae</b>				
750.	1487 <i>Cyanella hyacinthoides</i>	Y		
<b>Thymelaeaceae</b>				
751.	5231 <i>Pimelea angustifolia</i> (Narrow-leaved Pimelea)			
752.	5232 <i>Pimelea argentea</i> (Silvery Leaved Pimelea)			
753.	11928 <i>Pimelea ciliata</i> subsp. <i>ciliata</i>			
754.	11402 <i>Pimelea imbricata</i> var. <i>piligera</i>			
755.	11182 <i>Pimelea lehmanniana</i> subsp. <i>nervosa</i>			
756.	12041 <i>Pimelea suaveolens</i> subsp. <i>suaveolens</i>			
757.	5268 <i>Pimelea sulphurea</i> (Yellow Banjine)			
<b>Verbenaceae</b>				
758.	19511 <i>Verbena officinalis</i>	Y		
<b>Violaceae</b>				
759.	5216 <i>Hybanthus calycinus</i> (Wild Violet)			
<b>Xanthorrhoeaceae</b>				

Name ID	Species Name	Naturalised	Conservation Code	<sup>1</sup> Endemic To Query Area
760.	1249 <i>Xanthorrhoea acanthostachya</i>			
761.	1252 <i>Xanthorrhoea drummondii</i>			
762.	1253 <i>Xanthorrhoea gracilis</i> (Graceful Grass Tree, Mimidi)			
763.	1256 <i>Xanthorrhoea preissii</i> (Grass tree, Palga)			

### Zamiaceae

764.	85 <i>Macrozamia riedlei</i> (Zamia, Djiridji)			
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#### Conservation Codes

- T - Rare or likely to become extinct
- X - Presumed extinct
- IA - Protected under international agreement
- S - Other specially protected fauna
- 1 - Priority 1
- 2 - Priority 2
- 3 - Priority 3
- 4 - Priority 4
- 5 - Priority 5

<sup>1</sup> For NatureMap's purposes, species flagged as endemic are those whose records are wholly contained within the search area. Note that only those records complying with the search criterion are included in the calculation. For example, if you limit records to those from a specific datasource, only records from that datasource are used to determine if a species is restricted to the query area.



# EPBC Act Protected Matters Report

This report provides general guidance on matters of national environmental significance and other matters protected by the EPBC Act in the area you have selected.

Information on the coverage of this report and qualifications on data supporting this report are contained in the caveat at the end of the report.

Information is available about [Environment Assessments](#) and the EPBC Act including significance guidelines, forms and application process details.

Report created: 15/12/15 17:48:44

[Summary](#)

[Details](#)

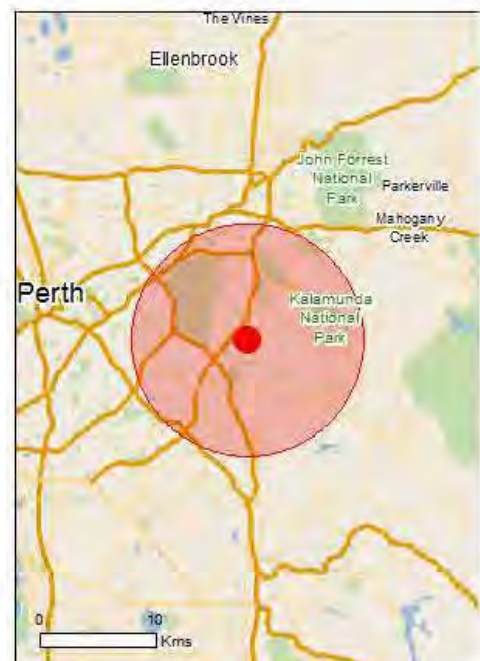
[Matters of NES](#)

[Other Matters Protected by the EPBC Act](#)

[Extra Information](#)

[Caveat](#)

[Acknowledgements](#)



This map may contain data which are ©Commonwealth of Australia (Geoscience Australia), ©PSMA 2010

[Coordinates](#)

Buffer: 10.0Km





# Summary

## Matters of National Environmental Significance

This part of the report summarises the matters of national environmental significance that may occur in, or may relate to, the area you nominated. Further information is available in the detail part of the report, which can be accessed by scrolling or following the links below. If you are proposing to undertake an activity that may have a significant impact on one or more matters of national environmental significance then you should consider the [Administrative Guidelines on Significance](#).

<a href="#">World Heritage Properties:</a>	None
<a href="#">National Heritage Places:</a>	None
<a href="#">Wetlands of International Importance:</a>	None
<a href="#">Great Barrier Reef Marine Park:</a>	None
<a href="#">Commonwealth Marine Area:</a>	None
<a href="#">Listed Threatened Ecological Communities:</a>	4
<a href="#">Listed Threatened Species:</a>	57
<a href="#">Listed Migratory Species:</a>	24

## Other Matters Protected by the EPBC Act

This part of the report summarises other matters protected under the Act that may relate to the area you nominated. Approval may be required for a proposed activity that significantly affects the environment on Commonwealth land, when the action is outside the Commonwealth land, or the environment anywhere when the action is taken on Commonwealth land. Approval may also be required for the Commonwealth or Commonwealth agencies proposing to take an action that is likely to have a significant impact on the environment anywhere.

The EPBC Act protects the environment on Commonwealth land, the environment from the actions taken on Commonwealth land, and the environment from actions taken by Commonwealth agencies. As heritage values of a place are part of the 'environment', these aspects of the EPBC Act protect the Commonwealth Heritage values of a Commonwealth Heritage place. Information on the new heritage laws can be found at <http://www.environment.gov.au/heritage>

A [permit](#) may be required for activities in or on a Commonwealth area that may affect a member of a listed threatened species or ecological community, a member of a listed migratory species, whales and other cetaceans, or a member of a listed marine species.

<a href="#">Commonwealth Land:</a>	5
<a href="#">Commonwealth Heritage Places:</a>	None
<a href="#">Listed Marine Species:</a>	27
<a href="#">Whales and Other Cetaceans:</a>	None
<a href="#">Critical Habitats:</a>	None
<a href="#">Commonwealth Reserves Terrestrial:</a>	None
<a href="#">Commonwealth Reserves Marine:</a>	None

## Extra Information

This part of the report provides information that may also be relevant to the area you have nominated.

<a href="#">State and Territory Reserves:</a>	16
<a href="#">Regional Forest Agreements:</a>	1
<a href="#">Invasive Species:</a>	49
<a href="#">Nationally Important Wetlands:</a>	3
<a href="#">Key Ecological Features (Marine)</a>	None

# Details

## Matters of National Environmental Significance

### Listed Threatened Ecological Communities

[ [Resource Information](#) ]

For threatened ecological communities where the distribution is well known, maps are derived from recovery plans, State vegetation maps, remote sensing imagery and other sources. Where threatened ecological community distributions are less well known, existing vegetation maps and point location data are used to produce indicative distribution maps.

Name	Status	Type of Presence
<a href="#">Claypans of the Swan Coastal Plain</a>	Critically Endangered	Community likely to occur within area
<a href="#">Corymbia calophylla - Kingia australis woodlands on heavy soils of the Swan Coastal Plain</a>	Endangered	Community known to occur within area
<a href="#">Shrublands and Woodlands of the eastern Swan Coastal Plain</a>	Endangered	Community known to occur within area
<a href="#">Subtropical and Temperate Coastal Saltmarsh</a>	Vulnerable	Community likely to occur within area

### Listed Threatened Species

[ [Resource Information](#) ]

Name	Status	Type of Presence
<b>Birds</b>		
<a href="#">Anous tenuirostris melanops</a> Australian Lesser Noddy [26000]	Vulnerable	Species or species habitat may occur within area
<a href="#">Botaurus poiciloptilus</a> Australasian Bittern [1001]	Endangered	Species or species habitat known to occur within area
<a href="#">Calyptorhynchus banksii naso</a> Forest Red-tailed Black-Cockatoo, Karrak [67034]	Vulnerable	Species or species habitat may occur within area
<a href="#">Calyptorhynchus baudinii</a> Baudin's Black-Cockatoo, Long-billed Black-Cockatoo [769]	Vulnerable	Roosting known to occur within area
<a href="#">Calyptorhynchus latirostris</a> Carnaby's Black-Cockatoo, Short-billed Black-Cockatoo [59523]	Endangered	Breeding likely to occur within area
<a href="#">Diomedea epomophora epomophora</a> Southern Royal Albatross [25996]	Vulnerable	Species or species habitat likely to occur within area
<a href="#">Diomedea epomophora sanfordi</a> Northern Royal Albatross [82331]	Endangered	Species or species habitat likely to occur within area
<a href="#">Diomedea exulans amsterdamensis</a> Amsterdam Albatross [82330]	Endangered	Species or species habitat may occur within area
<a href="#">Diomedea exulans exulans</a> Tristan Albatross [82337]	Endangered	Species or species habitat may occur within area
<a href="#">Diomedea exulans (sensu lato)</a> Wandering Albatross [1073]	Vulnerable	Species or species habitat likely to occur

Name	Status	Type of Presence
<a href="#">Leipoa ocellata</a> Malleefowl [934]	Vulnerable	Species or species habitat likely to occur within area
<a href="#">Macronectes giganteus</a> Southern Giant Petrel [1060]	Endangered	Species or species habitat may occur within area
<a href="#">Macronectes halli</a> Northern Giant Petrel [1061]	Vulnerable	Species or species habitat may occur within area
<a href="#">Pachyptila turtur subantarctica</a> Fairy Prion (southern) [64445]	Vulnerable	Species or species habitat likely to occur within area
<a href="#">Rostratula australis</a> Australian Painted Snipe [77037]	Endangered	Species or species habitat likely to occur within area
<a href="#">Thalassarche cauta cauta</a> Shy Albatross, Tasmanian Shy Albatross [82345]	Vulnerable	Species or species habitat may occur within area
<a href="#">Thalassarche cauta steadi</a> White-capped Albatross [82344]	Vulnerable	Species or species habitat likely to occur within area
<a href="#">Thalassarche melanophris</a> Black-browed Albatross [66472]	Vulnerable	Species or species habitat may occur within area
<a href="#">Thalassarche melanophris impavida</a> Campbell Albatross [82449]	Vulnerable	Species or species habitat may occur within area
<b>Insects</b>		
<a href="#">Leioproctus douglasiellus</a> a short-tongued bee [66756]	Critically Endangered	Species or species habitat known to occur within area
<b>Mammals</b>		
<a href="#">Bettongia penicillata ogilbyi</a> Woylie [66844]	Endangered	Species or species habitat may occur within area
<a href="#">Dasyurus geoffroii</a> Chuditch, Western Quoll [330]	Vulnerable	Species or species habitat known to occur within area
<a href="#">Pseudocheirus occidentalis</a> Western Ringtail Possum, Ngwayir [25911]	Vulnerable	Species or species habitat may occur within area
<a href="#">Setonix brachyurus</a> Quokka [229]	Vulnerable	Species or species habitat likely to occur within area
<b>Plants</b>		
<a href="#">Acacia anomala</a> Grass Wattle, Chittering Grass Wattle [8153]	Vulnerable	Species or species habitat known to occur within area
<a href="#">Acacia aphylla</a> Leafless Rock Wattle [13553]	Vulnerable	Species or species habitat known to occur within area
<a href="#">Andersonia gracilis</a> Slender Andersonia [14470]	Endangered	Species or species habitat known to occur within area

Name	Status	Type of Presence
<a href="#">Anigozanthos viridis subsp. terraspectans</a> Dwarf Green Kangaroo Paw [3435]	Vulnerable	Species or species habitat may occur within area
<a href="#">Anthocercis gracilis</a> Slender Tailflower [11103]	Vulnerable	Species or species habitat likely to occur within area
<a href="#">Banksia mimica</a> Summer Honeypot [82765]	Endangered	Species or species habitat likely to occur within area
<a href="#">Caladenia huegelii</a> King Spider-orchid, Grand Spider-orchid, Rusty Spider-orchid [7309]	Endangered	Species or species habitat likely to occur within area
<a href="#">Calytrix breviseta subsp. breviseta</a> Swamp Starflower [23879]	Endangered	Species or species habitat known to occur within area
<a href="#">Chamelaucium sp. Gingin (N.G.Marchant 6)</a> Gingin Wax [64649]	Endangered	Species or species habitat may occur within area
<a href="#">Conospermum undulatum</a> Wavy-leaved Smokebush [24435]	Vulnerable	Species or species habitat likely to occur within area
<a href="#">Darwinia apiculata</a> Scarp Darwinia [8763]	Endangered	Species or species habitat likely to occur within area
<a href="#">Darwinia foetida</a> Muccha Bell [83190]	Critically Endangered	Species or species habitat likely to occur within area
<a href="#">Diuris drummondii</a> Tall Donkey Orchid [4365]	Vulnerable	Species or species habitat likely to occur within area
<a href="#">Diuris micrantha</a> Dwarf Bee-orchid [55082]	Vulnerable	Species or species habitat likely to occur within area
<a href="#">Diuris purdiei</a> Purdie's Donkey-orchid [12950]	Endangered	Species or species habitat known to occur within area
<a href="#">Drakaea elastica</a> Glossy-leaved Hammer-orchid, Praying Virgin [16753]	Endangered	Species or species habitat likely to occur within area
<a href="#">Drakaea micrantha</a> Dwarf Hammer-orchid [56755]	Vulnerable	Species or species habitat may occur within area
<a href="#">Eleocharis keigheryi</a> Keighery's Eleocharis [64893]	Vulnerable	Species or species habitat likely to occur within area
<a href="#">Eucalyptus balanites</a> Cadda Road Mallee, Cadda Mallee [24264]	Endangered	Species or species habitat may occur within area
<a href="#">Grevillea curviloba subsp. incurva</a> Narrow curved-leaf Grevillea [64909]	Endangered	Species or species habitat likely to occur within area
<a href="#">Lasiopetalum pterocarpum</a> Wing-fruited Lasiopetalum [64922]	Endangered	Species or species habitat may occur within area

Name	Status	Type of Presence
<a href="#">Lepidosperma rostratum</a> Beaked Lepidosperma [14152]	Endangered	Species or species habitat likely to occur within area
<a href="#">Macarthuria keigheryi</a> Keighery's Macarthuria [64930]	Endangered	Species or species habitat likely to occur within area
<a href="#">Ptilotus pyramidatus</a> Pyramid Mulla-mulla [18216]	Critically Endangered	Species or species habitat known to occur within area
<a href="#">Synaphea sp. Fairbridge Farm (D.Papenfus 696)</a> Selena's Synaphea [82881]	Critically Endangered	Species or species habitat likely to occur within area
<a href="#">Synaphea stenoloba</a> Dwellingup Synaphea [66311]	Endangered	Species or species habitat may occur within area
<a href="#">Thelymitra dedmaniarum</a> Cinnamon Sun Orchid [65105]	Endangered	Species or species habitat likely to occur within area
<a href="#">Thelymitra stellata</a> Star Sun-orchid [7060]	Endangered	Species or species habitat known to occur within area
<a href="#">Trithuria occidentalis</a> Swan Hydatella [42224]	Endangered	Species or species habitat likely to occur within area

#### Reptiles

<a href="#">Caretta caretta</a> Loggerhead Turtle [1763]	Endangered	Species or species habitat known to occur within area
<a href="#">Chelonia mydas</a> Green Turtle [1765]	Vulnerable	Species or species habitat known to occur within area
<a href="#">Dermochelys coriacea</a> Leatherback Turtle, Leathery Turtle, Luth [1768]	Endangered	Species or species habitat known to occur within area
<a href="#">Natator depressus</a> Flatback Turtle [59257]	Vulnerable	Species or species habitat known to occur within area

#### Listed Migratory Species

#### [ Resource Information ]

\* Species is listed under a different scientific name on the EPBC Act - Threatened Species list.

Name	Threatened	Type of Presence
<b>Migratory Marine Birds</b>		
<a href="#">Apus pacificus</a> Fork-tailed Swift [678]		Species or species habitat likely to occur within area
<a href="#">Diomedea amsterdamensis</a> Amsterdam Albatross [64405]	Endangered*	Species or species habitat may occur within area
<a href="#">Diomedea dabbenena</a> Tristan Albatross [66471]	Endangered*	Species or species habitat may occur within area
<a href="#">Diomedea epomophora (sensu stricto)</a> Southern Royal Albatross [1072]	Vulnerable*	Species or species habitat likely to occur within area
<a href="#">Diomedea exulans (sensu lato)</a> Wandering Albatross [1073]	Vulnerable	Species or species habitat likely to occur

Name	Threatened	Type of Presence
<a href="#">Diomedea sanfordi</a> Northern Royal Albatross [64456]	Endangered*	Species or species habitat likely to occur within area
<a href="#">Macronectes giganteus</a> Southern Giant Petrel [1060]	Endangered	Species or species habitat may occur within area
<a href="#">Macronectes halli</a> Northern Giant Petrel [1061]	Vulnerable	Species or species habitat may occur within area
<a href="#">Thalassarche cauta (sensu stricto)</a> Shy Albatross, Tasmanian Shy Albatross [64697]	Vulnerable*	Species or species habitat may occur within area
<a href="#">Thalassarche impavida</a> Campbell Albatross, Campbell Black-browed Albatross [64459]	Vulnerable*	Species or species habitat may occur within area
<a href="#">Thalassarche melanophris</a> Black-browed Albatross [66472]	Vulnerable	Species or species habitat may occur within area
<a href="#">Thalassarche steadi</a> White-capped Albatross [64462]	Vulnerable*	Species or species habitat likely to occur within area
<b>Migratory Marine Species</b>		
<a href="#">Caretta caretta</a> Loggerhead Turtle [1763]	Endangered	Species or species habitat known to occur within area
<a href="#">Chelonia mydas</a> Green Turtle [1765]	Vulnerable	Species or species habitat known to occur within area
<a href="#">Dermochelys coriacea</a> Leatherback Turtle, Leathery Turtle, Luth [1768]	Endangered	Species or species habitat known to occur within area
<a href="#">Manta alfredi</a> Reef Manta Ray, Coastal Manta Ray, Inshore Manta Ray, Prince Alfred's Ray, Resident Manta Ray [84994]		Species or species habitat may occur within area
<a href="#">Manta birostris</a> Giant Manta Ray, Chevron Manta Ray, Pacific Manta Ray, Pelagic Manta Ray, Oceanic Manta Ray [84995]		Species or species habitat may occur within area
<a href="#">Natator depressus</a> Flatback Turtle [59257]	Vulnerable	Species or species habitat known to occur within area
<b>Migratory Terrestrial Species</b>		
<a href="#">Merops ornatus</a> Rainbow Bee-eater [670]		Species or species habitat may occur within area
<a href="#">Motacilla cinerea</a> Grey Wagtail [642]		Species or species habitat may occur within area
<b>Migratory Wetlands Species</b>		
<a href="#">Ardea alba</a> Great Egret, White Egret [59541]		Breeding known to occur within area
<a href="#">Ardea ibis</a> Cattle Egret [59542]		Species or species habitat may occur within area

Name	Threatened	Type of Presence
<a href="#">Pandion haliaetus</a> Osprey [952]		Breeding known to occur within area
<a href="#">Tringa nebularia</a> Common Greenshank, Greenshank [832]		Species or species habitat likely to occur within area

## Other Matters Protected by the EPBC Act

### Commonwealth Land [\[ Resource Information \]](#)

The Commonwealth area listed below may indicate the presence of Commonwealth land in this vicinity. Due to the unreliability of the data source, all proposals should be checked as to whether it impacts on a Commonwealth area, before making a definitive decision. Contact the State or Territory government land department for further information.

#### Name

Commonwealth Land -  
Defence - AIRTC CANNINGTON  
Defence - BUSHMEAD RIFLE RANGE  
Defence - BUSHMEAD TRAINING AREA  
Defence - PALMER BARRACKS - SOUTH GUILDFORD

### Listed Marine Species [\[ Resource Information \]](#)

\* Species is listed under a different scientific name on the EPBC Act - Threatened Species list.

Name	Threatened	Type of Presence
<b>Birds</b>		
<a href="#">Anous tenuirostris melanops</a> Australian Lesser Noddy [26000]	Vulnerable	Species or species habitat may occur within area
<a href="#">Apus pacificus</a> Fork-tailed Swift [678]		Species or species habitat likely to occur within area
<a href="#">Ardea alba</a> Great Egret, White Egret [59541]		Breeding known to occur within area
<a href="#">Ardea ibis</a> Cattle Egret [59542]		Species or species habitat may occur within area
<a href="#">Diomedea amsterdamensis</a> Amsterdam Albatross [64405]	Endangered*	Species or species habitat may occur within area
<a href="#">Diomedea dabbenena</a> Tristan Albatross [66471]	Endangered*	Species or species habitat may occur within area
<a href="#">Diomedea epomophora (sensu stricto)</a> Southern Royal Albatross [1072]	Vulnerable*	Species or species habitat likely to occur within area
<a href="#">Diomedea exulans (sensu lato)</a> Wandering Albatross [1073]	Vulnerable	Species or species habitat likely to occur

Name	Threatened	Type of Presence
<a href="#">Diomedea sanfordi</a> Northern Royal Albatross [64456]	Endangered*	Species or species habitat likely to occur within area
<a href="#">Haliaeetus leucogaster</a> White-bellied Sea-Eagle [943]		Species or species habitat likely to occur within area
<a href="#">Macronectes giganteus</a> Southern Giant Petrel [1060]	Endangered	Species or species habitat may occur within area
<a href="#">Macronectes halli</a> Northern Giant Petrel [1061]	Vulnerable	Species or species habitat may occur within area
<a href="#">Merops ornatus</a> Rainbow Bee-eater [670]		Species or species habitat may occur within area
<a href="#">Motacilla cinerea</a> Grey Wagtail [642]		Species or species habitat may occur within area
<a href="#">Pachyptila turtur</a> Fairy Prion [1066]		Species or species habitat likely to occur within area
<a href="#">Pandion haliaetus</a> Osprey [952]		Breeding known to occur within area
<a href="#">Rostratula benghalensis (sensu lato)</a> Painted Snipe [889]	Endangered*	Species or species habitat likely to occur within area
<a href="#">Thalassarche cauta (sensu stricto)</a> Shy Albatross, Tasmanian Shy Albatross [64697]	Vulnerable*	Species or species habitat may occur within area
<a href="#">Thalassarche impavida</a> Campbell Albatross, Campbell Black-browed Albatross [64459]	Vulnerable*	Species or species habitat may occur within area
<a href="#">Thalassarche melanophris</a> Black-browed Albatross [66472]	Vulnerable	Species or species habitat may occur within area
<a href="#">Thalassarche steadi</a> White-capped Albatross [64462]	Vulnerable*	Species or species habitat likely to occur within area
<a href="#">Thinornis rubricollis</a> Hooded Plover [59510]		Species or species habitat may occur within area
<a href="#">Tringa nebularia</a> Common Greenshank, Greenshank [832]		Species or species habitat likely to occur within area
<b>Reptiles</b>		
<a href="#">Caretta caretta</a> Loggerhead Turtle [1763]	Endangered	Species or species habitat known to occur within area
<a href="#">Chelonia mydas</a> Green Turtle [1765]	Vulnerable	Species or species habitat known to occur within area
<a href="#">Dermochelys coriacea</a> Leatherback Turtle, Leathery Turtle, Luth [1768]	Endangered	Species or species habitat known to occur within area



Name	Threatened	Type of Presence
<a href="#">Natator depressus</a> Flatback Turtle [59257]	Vulnerable	Species or species habitat known to occur within area

## Extra Information

### State and Territory Reserves [\[ Resource Information \]](#)

Name	State
Beelu	WA
Gooseberry Hill	WA
Greenmount	WA
Kalamunda	WA
Kenwick Wetlands	WA
Korung	WA
Lesmurdie Falls	WA
Unnamed WA23076	WA
Unnamed WA24657	WA
Unnamed WA28740	WA
Unnamed WA29815	WA
Unnamed WA37997	WA
Unnamed WA45106	WA
Unnamed WA47244	WA
Unnamed WA49079	WA
Unnamed WA49363	WA

### Regional Forest Agreements [\[ Resource Information \]](#)

Note that all areas with completed RFAs have been included.

Name	State
<a href="#">South West WA RFA</a>	Western Australia

### Invasive Species [\[ Resource Information \]](#)

Weeds reported here are the 20 species of national significance (WoNS), along with other introduced plants that are considered by the States and Territories to pose a particularly significant threat to biodiversity. The following feral animals are reported: Goat, Red Fox, Cat, Rabbit, Pig, Water Buffalo and Cane Toad. Maps from Landscape Health Project, National Land and Water Resources Audit, 2001.

Name	Status	Type of Presence
<b>Birds</b>		
Acridotheres tristis Common Myna, Indian Myna [387]		Species or species habitat likely to occur within area
Anas platyrhynchos Mallard [974]		Species or species habitat likely to occur within area
Carduelis carduelis European Goldfinch [403]		Species or species habitat likely to occur within area
Columba livia Rock Pigeon, Rock Dove, Domestic Pigeon [803]		Species or species habitat likely to occur within area
Passer domesticus House Sparrow [405]		Species or species habitat likely to occur

Name	Status	Type of Presence
Passer montanus Eurasian Tree Sparrow [406]		within area Species or species habitat likely to occur within area
Streptopelia chinensis Spotted Turtle-Dove [780]		Species or species habitat likely to occur within area
Streptopelia senegalensis Laughing Turtle-dove, Laughing Dove [781]		Species or species habitat likely to occur within area
Sturnus vulgaris Common Starling [389]		Species or species habitat likely to occur within area
Turdus merula Common Blackbird, Eurasian Blackbird [596]		Species or species habitat likely to occur within area
<b>Mammals</b>		
Bos taurus Domestic Cattle [16]		Species or species habitat likely to occur within area
Canis lupus familiaris Domestic Dog [82654]		Species or species habitat likely to occur within area
Capra hircus Goat [2]		Species or species habitat likely to occur within area
Felis catus Cat, House Cat, Domestic Cat [19]		Species or species habitat likely to occur within area
Feral deer Feral deer species in Australia [85733]		Species or species habitat likely to occur within area
Funambulus pennantii Northern Palm Squirrel, Five-striped Palm Squirrel [129]		Species or species habitat likely to occur within area
Mus musculus House Mouse [120]		Species or species habitat likely to occur within area
Oryctolagus cuniculus Rabbit, European Rabbit [128]		Species or species habitat likely to occur within area
Rattus norvegicus Brown Rat, Norway Rat [83]		Species or species habitat likely to occur within area
Rattus rattus Black Rat, Ship Rat [84]		Species or species habitat likely to occur within area
Sus scrofa Pig [6]		Species or species habitat likely to occur within area
Vulpes vulpes Red Fox, Fox [18]		Species or species habitat likely to occur within area
<b>Plants</b>		
Anredera cordifolia Madeira Vine, Jalap, Lamb's-tail, Mignonette Vine,		Species or species

Name	Status	Type of Presence
Anredera, Gulf Madeiravine, Heartleaf Madeiravine, Potato Vine [2643] Asparagus aethiopicus		habitat likely to occur within area
Asparagus Fern, Ground Asparagus, Basket Fern, Sprengi's Fern, Bushy Asparagus, Emerald Asparagus [62425] Asparagus asparagoides		Species or species habitat likely to occur within area
Bridal Creeper, Bridal Veil Creeper, Smilax, Florist's Smilax, Smilax Asparagus [22473]		Species or species habitat likely to occur within area
Asparagus declinatus Bridal Veil, Bridal Veil Creeper, Pale Berry Asparagus Fern, Asparagus Fern, South African Creeper [66908]		Species or species habitat likely to occur within area
Asparagus plumosus Climbing Asparagus-fern [48993]		Species or species habitat likely to occur within area
Brachiaria mutica Para Grass [5879]		Species or species habitat may occur within area
Cenchrus ciliaris Buffel-grass, Black Buffel-grass [20213]		Species or species habitat may occur within area
Chrysanthemoides monilifera Bitou Bush, Boneseed [18983]		Species or species habitat may occur within area
Chrysanthemoides monilifera subsp. monilifera Boneseed [16905]		Species or species habitat likely to occur within area
Eichhornia crassipes Water Hyacinth, Water Orchid, Nile Lily [13466]		Species or species habitat likely to occur within area
Genista linifolia Flax-leaved Broom, Mediterranean Broom, Flax Broom [2800]		Species or species habitat likely to occur within area
Genista monspessulana Montpellier Broom, Cape Broom, Canary Broom, Common Broom, French Broom, Soft Broom [20126]		Species or species habitat likely to occur within area
Genista sp. X Genista monspessulana Broom [67538]		Species or species habitat may occur within area
Lantana camara Lantana, Common Lantana, Kamara Lantana, Large-leaf Lantana, Pink Flowered Lantana, Red Flowered Lantana, Red-Flowered Sage, White Sage, Wild Sage [10892] Lycium ferocissimum African Boxthorn, Boxthorn [19235]		Species or species habitat likely to occur within area
Olea europaea Olive, Common Olive [9160]		Species or species habitat may occur within area
Opuntia spp. Prickly Pears [82753]		Species or species habitat likely to occur within area
Pinus radiata Radiata Pine Monterey Pine, Insignis Pine, Wilding Pine [20780]		Species or species habitat may occur within area
Protasparagus densiflorus Asparagus Fern, Plume Asparagus [5015]		Species or species

Name	Status	Type of Presence
Protasparagus plumosus Climbing Asparagus-fern, Ferny Asparagus [11747]		habitat likely to occur within area  Species or species habitat likely to occur within area
Rubus fruticosus aggregate Blackberry, European Blackberry [68406]		Species or species habitat likely to occur within area
Sagittaria platyphylla Delta Arrowhead, Arrowhead, Slender Arrowhead [68483]		Species or species habitat likely to occur within area
Salix spp. except S.babylonica, S.x calodendron & S.x reichardtii Willows except Weeping Willow, Pussy Willow and Sterile Pussy Willow [68497]		Species or species habitat likely to occur within area
Salvinia molesta Salvinia, Giant Salvinia, Aquarium Watermoss, Kariba Weed [13665]		Species or species habitat likely to occur within area
Tamarix aphylla Athel Pine, Athel Tree, Tamarisk, Athel Tamarisk, Athel Tamarix, Desert Tamarisk, Flowering Cypress, Salt Cedar [16018]		Species or species habitat likely to occur within area
<b>Reptiles</b>		
Hemidactylus frenatus Asian House Gecko [1708]		Species or species habitat likely to occur within area
Ramphotyphlops braminus Flowerpot Blind Snake, Brahminy Blind Snake, Cacing Besi [1258]		Species or species habitat likely to occur within area

#### Nationally Important Wetlands

Name	[ Resource Information ]
<a href="#">Brixton Street Swamps</a>	State WA
<a href="#">Perth Airport Woodland Swamps</a>	WA
<a href="#">Swan-Canning Estuary</a>	WA

# Caveat

The information presented in this report has been provided by a range of data sources as acknowledged at the end of the report.

This report is designed to assist in identifying the locations of places which may be relevant in determining obligations under the Environment Protection and Biodiversity Conservation Act 1999. It holds mapped locations of World and National Heritage properties, Wetlands of International and National Importance, Commonwealth and State/Territory reserves, listed threatened, migratory and marine species and listed threatened ecological communities. Mapping of Commonwealth land is not complete at this stage. Maps have been collated from a range of sources at various resolutions.

Not all species listed under the EPBC Act have been mapped (see below) and therefore a report is a general guide only. Where available data supports mapping, the type of presence that can be determined from the data is indicated in general terms. People using this information in making a referral may need to consider the qualifications below and may need to seek and consider other information sources.

For threatened ecological communities where the distribution is well known, maps are derived from recovery plans, State vegetation maps, remote sensing imagery and other sources. Where threatened ecological community distributions are less well known, existing vegetation maps and point location data are used to produce indicative distribution maps.

For species where the distributions are well known, maps are digitised from sources such as recovery plans and detailed habitat studies. Where appropriate, core breeding, foraging and roosting areas are indicated under 'type of presence'. For species whose distributions are less well known, point locations are collated from government wildlife authorities, museums, and non-government organisations; bioclimatic distribution models are generated and these validated by experts. In some cases, the distribution maps are based solely on expert knowledge.

Only selected species covered by the following provisions of the EPBC Act have been mapped:

- migratory and
- marine

The following species and ecological communities have not been mapped and do not appear in reports produced from this database:

- threatened species listed as extinct or considered as vagrants
- some species and ecological communities that have only recently been listed
- some terrestrial species that overfly the Commonwealth marine area
- migratory species that are very widespread, vagrant, or only occur in small numbers

The following groups have been mapped, but may not cover the complete distribution of the species:

- non-threatened seabirds which have only been mapped for recorded breeding sites
- seals which have only been mapped for breeding sites near the Australian continent

Such breeding sites may be important for the protection of the Commonwealth Marine environment.

# Coordinates

-31.97452 116.01127

# Acknowledgements

This database has been compiled from a range of data sources. The department acknowledges the following custodians who have contributed valuable data and advice:

- [-Office of Environment and Heritage, New South Wales](#)
- [-Department of Environment and Primary Industries, Victoria](#)
- [-Department of Primary Industries, Parks, Water and Environment, Tasmania](#)
- [-Department of Environment, Water and Natural Resources, South Australia](#)
- [-Parks and Wildlife Commission NT, Northern Territory Government](#)
- [-Department of Environmental and Heritage Protection, Queensland](#)
- [-Department of Parks and Wildlife, Western Australia](#)
- [-Environment and Planning Directorate, ACT](#)
- [-Birdlife Australia](#)
- [-Australian Bird and Bat Banding Scheme](#)
- [-Australian National Wildlife Collection](#)
- Natural history museums of Australia
- [-Museum Victoria](#)
- [-Australian Museum](#)
- [-South Australian Museum](#)
- [-Queensland Museum](#)
- [-Online Zoological Collections of Australian Museums](#)
- [-Queensland Herbarium](#)
- [-National Herbarium of NSW](#)
- [-Royal Botanic Gardens and National Herbarium of Victoria](#)
- [-Tasmanian Herbarium](#)
- [-State Herbarium of South Australia](#)
- [-Northern Territory Herbarium](#)
- [-Western Australian Herbarium](#)
- [-Australian National Herbarium, Atherton and Canberra](#)
- [-University of New England](#)
- [-Ocean Biogeographic Information System](#)
- [-Australian Government, Department of Defence](#)
- [Forestry Corporation, NSW](#)
- [-Geoscience Australia](#)
- [-CSIRO](#)
- Other groups and individuals

The Department is extremely grateful to the many organisations and individuals who provided expert advice and information on numerous draft distributions.

Please feel free to provide feedback via the [Contact Us](#) page.

**Appendix 4**  
**Conservation significant flora and**  
**ecological community definitions**

### ***Conservation Codes for Western Australia (Western Australian Herbarium 1998-)***

Under the *Wildlife Conservation Act* (1950), the Minister for the Environment may declare species of flora to be protected if they are considered to be in danger of extinction, rare or otherwise in need of special protection. Schedules 1 and 2 deal with those that are threatened and those that are presumed extinct, respectively.

#### **T: Threatened Flora (Declared Rare Flora – Extant)**

Species which have been adequately searched for and are deemed to be in the wild either rare, in danger of extinction, or otherwise in need of special protection, and have been gazetted as such (Schedule 1 under the *Wildlife Conservation Act 1950*).

Threatened Flora (Schedule 1) are further ranked by the Department according to their level of threat using IUCN Red List Criteria:

- CR: Critically Endangered – considered to be facing an extremely high risk of extinction in the wild
- EN: Endangered – considered to be facing a very high risk of extinction in the wild
- VU: Vulnerable – considered to be facing a high risk of extinction in the wild
- X: Presumed Extinct Flora (Declared Rare Flora – Extinct).

Species that have been adequately searched for and there is no reasonable doubt that the last individual has died, and have been gazetted as such (Schedule 2 under the *Wildlife Conservation Act 1950*).

#### ***Priority Flora***

Species that have not yet been adequately surveyed to be listed under Schedule 1 or 2 are added to the Priority Flora List under Priorities 1, 2 or 3. These three categories are ranked in order of priority for survey and evaluation of conservation status so that consideration can be given to their declaration as threatened flora or fauna. Species that are adequately known, are rare but not threatened, or meet criteria for Near Threatened, or that have been recently removed from the threatened list for other than taxonomic reasons, are placed in Priority 4. These species require regular monitoring. Conservation Dependent species are placed in Priority 5.

#### **Priority One: Poorly-known Species**

Species that are known from one or a few collections or sight records (generally less than 5), all on lands not managed for conservation, e.g. agricultural or pastoral lands, urban areas, Shire, Westrail and Main Roads WA road, gravel and soil reserves, and active mineral leases and under threat of habitat destruction or degradation. Species may be included if they are comparatively well known from one or more localities but do not meet adequacy of survey requirements and appear to be under immediate threat from known threatening processes.

#### **Priority Two: Poorly-known Species**

Species that are known from one or a few collections or sight records, some of which are on lands not under imminent threat of habitat destruction or degradation, e.g. national parks, conservation parks, nature reserves, State forest, vacant Crown land, water reserves, etc. Species may be included if they are comparatively well known from one or more localities but do not meet adequacy of survey requirements and appear to be under immediate threat from known threatening processes.



### **Priority Three: Poorly-known Species**

Species that are known from collections or sight records from several localities not under imminent threat, or from few but widespread localities with either large population size or significant remaining areas of apparently suitable habitat, much of it not under imminent threat. Species may be included if they are comparatively well known from several localities but do not meet adequacy of survey requirements and known threatening processes exist that could affect them.

### **Priority Four: Rare, Near Threatened and other species in need of monitoring**

1. Rare: Species that are considered to have been adequately surveyed, or for which sufficient knowledge is available, and that are considered not currently threatened or in need of special protection, but could be if present circumstances change. These species are usually represented on conservation lands.
2. Near Threatened: Species that are considered to have been adequately surveyed and that do not qualify for Conservation Dependent, but that are close to qualifying for Vulnerable.
3. Species that have been removed from the list of threatened species during the past 5 years for reasons other than taxonomy.

### **Priority 5: Conservation Dependent Species**

Species that are not threatened but are subject to a specific conservation program, the cessation of which would result in the species becoming threatened within 5 years.

## *Definition of Threatened Ecological Communities (DEC 2010)*

### **Presumed Totally Destroyed (PD)**

An ecological community will be listed as presumed totally destroyed if there are no recent records of the community being extant and either of the following applies:

- records within the last 50 years have not been confirmed despite thorough searches of known or likely habitats or
- all occurrences recorded within the last 50 years have since been destroyed.

### **Critically Endangered (CR)**

An ecological community will be listed as Critically Endangered when it has been adequately surveyed and is found to be facing an extremely high risk of total destruction in the immediate future. This will be determined on the basis of the best available information, by it meeting any one or more of the following criteria:

1. The estimated geographic range, and/or total area occupied, and/or number of discrete occurrences since European settlement have been reduced by at least 90% and either or both of the following apply:
  - (a) geographic range, and/or total area occupied and/or number of discrete occurrences are continuing to decline such that total destruction of the community is imminent (within approximately 10 years)
  - (b) modification throughout its range is continuing such that in the immediate future (within approximately 10 years) the community is unlikely to be capable of being substantially rehabilitated.
2. Current distribution is limited, and one or more of the following apply:
  - (a) geographic range and/or number of discrete occurrences, and/or area occupied is highly restricted and the community is currently subject to known threatening processes which are likely to result in total destruction throughout its range in the immediate future (within approximately 10 years)
  - (b) there are very few occurrences, each of which is small and/or isolated and extremely vulnerable to known threatening processes
  - (c) there may be many occurrences but total area is very small and each occurrence is small and/or isolated and extremely vulnerable to known threatening processes.
3. The ecological community exists only as highly modified occurrences that may be capable of being rehabilitated if such work begins in the immediate future (within approximately 10 years).

### **Endangered (EN)**

An ecological community will be listed as Endangered when it has been adequately surveyed and is not Critically Endangered but is facing a very high risk of total destruction in the near future. This will be determined on the basis of the best available information by it meeting any one or more of the following criteria:

1. The geographic range, and/or total area occupied, and/or number of discrete occurrences have been reduced by at least 70% since European settlement and either or both of the following apply:
  - (a) the estimated geographic range, and/or total area occupied and/or number of discrete occurrences are continuing to decline such that total destruction of the community is likely in the short term future (within approximately 20 years)
  - (b) modification throughout its range is continuing such that in the short term future (within approximately 20 years) the community is unlikely to be capable of being substantially restored or rehabilitated.

2. Current distribution is limited, and one or more of the following apply”
  - (a) geographic range and/or number of discrete occurrences, and/or area occupied is highly restricted and the community is currently subject to known threatening processes which are likely to result in total destruction throughout its range in the short term future (within approximately 20 years)
  - (b) there are few occurrences, each of which is small and/or isolated and all or most occurrences are very vulnerable to known threatening processes
  - (c) there may be many occurrences but total area is small and all or most occurrences are small and/or isolated and very vulnerable to known threatening processes.
3. The ecological community exists only as very modified occurrences that may be capable of being substantially restored or rehabilitated if such work begins in the short-term future (within approximately 20 years).

#### **Vulnerable (VU)**

An ecological community will be listed as Vulnerable when it has been adequately surveyed and is not Critically Endangered or Endangered but is facing a high risk of total destruction or significant modification in the medium to long-term future. This will be determined on the basis of the best available information by it meeting any one or more of the following criteria:

1. The ecological community exists largely as modified occurrences that are likely to be capable of being substantially restored or rehabilitated.
2. The ecological community may already be modified and would be vulnerable to threatening processes, is restricted in area and/or range and/or is only found at a few locations.
3. The ecological community may be still widespread but is believed likely to move into a category of higher threat in the medium to long term future because of existing or impending threatening processes.

## ***Definition of Priority Ecological Communities (DEC 2010)***

### **Priority One: Poorly-known ecological communities**

Ecological communities with apparently few, small occurrences, all or most not actively managed for conservation (e.g. within agricultural or pastoral lands, urban areas, active mineral leases) and for which current threats exist. Communities may be included if they are comparatively well-known from one or more localities but do not meet adequacy of survey requirements, and/or are not well defined, and appear to be under immediate threat from known threatening processes across their range.

### **Priority Two: Poorly-known ecological communities**

Communities that are known from few small occurrences, all or most of which are actively managed for conservation (e.g. within national parks, conservation parks, nature reserves, State forest, unallocated Crown land, water reserves, etc.) and not under imminent threat of destruction or degradation. Communities may be included if they are comparatively well known from one or more localities but do not meet adequacy of survey requirements, and/or are not well defined, and appear to be under threat from known threatening processes.

### **Priority Three: Poorly known ecological communities**

- communities that are known from several to many occurrences, a significant number or area of which are not under threat of habitat destruction or degradation
- communities known from a few widespread occurrences, which are either large or within significant remaining areas of habitat in which other occurrences may occur, much of it not under imminent threat
- communities made up of large, and/or widespread occurrences, that may or not be represented in the reserve system, but are under threat of modification across much of their range from processes such as grazing by domestic and/or feral stock, and inappropriate fire regimes.

Communities may be included if they are comparatively well known from several localities but do not meet adequacy of survey requirements and/or are not well defined, and known threatening processes exist that could affect them.

### **Priority Four**

Ecological communities that are adequately known, rare but not threatened or meet criteria for Near Threatened, or that have been recently removed from the threatened list. These communities require regular monitoring. These include:

1. Rare. Ecological communities known from few occurrences that are considered to have been adequately surveyed, or for which sufficient knowledge is available, and that are considered not currently threatened or in need of special protection, but could be if present circumstances change. These communities are usually represented on conservation lands.
2. Near Threatened. Ecological communities that are considered to have been adequately surveyed and that do not qualify for Conservation Dependent, but that are close to qualifying for Vulnerable.
3. Ecological communities that have been removed from the list of threatened communities during the past five years.

### **Priority Five: Conservation Dependent ecological communities**

Ecological communities that are not threatened but are subject to a specific conservation program, the cessation of which would result in the community becoming threatened within five years.

**Appendix 5**  
**FCT analysis report**

3 December 2015

Daniel Panickar  
Consultant  
Strategen  
Level 1, Subiaco Square Rd  
Subiaco, WA 6008

Dear Daniel,

Pursuant to your email of the 9<sup>th</sup> November 2015, I have undertaken an analysis of the supplied data in order to determine the Floristic Community Type (FCT) of the plant community(ies) present at the Forrestfield site. This letter documents the results of that analysis.

## 1 Methods

The remnant vegetation of the southern Swan Coastal Plain was surveyed by Gibson *et al.* (1994) to provide an understanding of the major floristic gradients across the region. The major plant communities (or FCTs) were defined by classifying the data according to the similarities in species composition between plots. When determining the FCT of a new record, a floristic analysis of species composition provides the most robust method that is consistent with the original classification.

Presently, a single consistent method for the determination of FCTs for vegetation data in the Swan Coastal Plain is not available. Therefore, it is preferable to use a few different methods and compare the output for the most likely result. All analyses described below were undertaken using R packages Cluster, Vegclust and Vegan.

### 1.1 Hierarchical Clustering

Hierarchical agglomerative clustering is the usual first stage in classifying vegetation data into community types. This involves calculating the similarity (or more often, the dissimilarity) between plots within the dataset and then sequentially fusing the plots into groups according to their similarity. This type of method was used in the analysis of the original Swan Coastal Plain dataset (Gibson *et al.* 1994), but its use as the basis for assigning new plot data to the regional classification has some drawbacks. Firstly, a hierarchical clustering only applies to the relationships between plots, and the relative distances between them, within that particular dataset. The addition of new data often alters the relative distances and disrupts the clustering output. Secondly, as an unsupervised method, hierarchical clustering does not define rules for the membership of the defined groups, and so the addition of new plots requires the rebuilding of the entire hierarchy (De Cáceres and Wiser 2012).

For the analysis of the Forrestfield data, non-native species were removed from the dataset. Including weeds in the dataset may compromise the assignment to community types by finding similarity to FCTs with a high proportion of weeds (e.g. FCT 6) or a naturally lower native species richness. The data for the Swan Coastal Plain regional survey (Gibson *et al.* 1994) was downloaded from the NatureMap website. This is largely similar to the original survey except for one site (OATES-1), which has now been excluded. The species nomenclature of the original dataset was updated to be consistent with current usage. Where original names could not be matched clearly to the updated usage, those taxa were removed from the analysis. As with the

original classification, singletons (taxa only recorded at one plot) were also removed from the dataset. The new data from the Forrestfield survey was added to the matrix one plot at a time to remove any effect of spatial correlation between the new plots. Each new dataset was then analysed calculating the Bray-Curtis distance coefficient (or resemblance measure) and the flexible beta linkage method ( $\beta = -0.1$ ). Assignment of the Forrestfield plots was to the nearest distinct group by inspection of the resulting dendrogram.

## 1.2 Nearest Neighbour

Another approach for assigning FCTs is to calculate a similarity or dissimilarity matrix for the combined new dataset and simply allocate each new plot to the FCT of the plot from the original dataset that shares the greatest similarity. There are a number of drawbacks with this method:

- the nearest neighbour may not be a 'near' neighbour;
- results may vary depending on the resemblance measure used; and
- the nearest neighbour may be a transitional site between groups and the similarity to a group as a whole may be limited.

The nearest neighbour to each of the Forrestfield plots was determined by calculating two different resemblance measures for comparison: the Bray-Curtis dissimilarity (a semi-metric distance measure) and the Hellinger distance (a metric distance measure).

## 1.3 Non-hierarchical clustering

Non-hierarchical clustering methods often allow new plot data to be added to previous classifications because they are based on the concept that each group or cluster is represented by a prototype i.e. either a centroid or a medoid (a 'type' plot) (De Cáceres and Wiser 2012). Therefore, new observations can be assigned to an existing classification by calculating the distance to the nearest prototype (which may be considered a membership criterion). This approach is to be preferred to the hierarchical reconstruction approach because it defines numerical rules that can be consistently applied. However, it also means the original classification needs to be reanalysed using a different method, which can be problematic because not all sites from the original classification may be diagnostic for their respective clusters.

For the analysis of the Forrestfield data, the same updated Swan Coastal Plain dataset was used as for the hierarchical clustering analysis. After calculating a Bray-Curtis distance matrix, the dataset was then analysed using Fuzzy C-Means clustering in the R package 'Vegclust'. A fuzziness coefficient of 1.1 was chosen to minimise influence from noisy data points. FCTs with too few plots to reliably define determine a prototype (e.g. FCT 14 with two plots) were removed from the analysis. Similarly, some plots that were regularly being misclassified (such as those from clusters with large internal heterogeneity) were also removed. The final dataset consisted of 344 plots with 1316 taxa representing 38 FCTs. Each site of the Forrestfield data was then assigned a FCT using function 'vegclass' in the Vegclust package.

It should be noted that this approach for FCT assignment is preliminary and will need to be refined further before it can be used consistently.

## 2 Results

The low native species richness for many of the Forrestfield plots meant that a FCT could not be determined with any confidence (Table 1; Figures 1-17). For example, Sites 2, 3, 7, 11, 12, 13

and 14 all recorded fewer than 10 native species. In the hierarchical clustering analysis, these sites fused very high in the dendrogram and an association with a particular group could not be reliably determined. The remaining sites also fused high in their respective dendrograms, but most results indicated that a FCT of either 3b or 3c would be an appropriate assignment.

The results of the nearest neighbour analysis was mostly consistent between the two distance measures, often only differing in the order of the nearest sites. Sites 16 and 17 showed the greatest difference between the distance measures. For example, the Hellinger distance shows that two sites from FCT 1b as being near neighbours to Site 17, whereas this result is not indicated at all for the Bray-Curtis measure.

The assignment of FCTs by non-hierarchical clustering did not produce a reasonable result. This approach can be sensitive to low species richness in the dataset being analysed. Where the surveyed vegetation has been disturbed or there is a significant presence of non-native weed species, the native species richness is often reduced. The assignment of community types by non-hierarchical means may then be compromised as absent species are treated as a difference to the defined groups and a greater similarity is found with groups of lower species richness than would otherwise be the case.

**Table 1: Results of hierarchical analysis for plots from the Forrestfield survey.**

Site	FCT First fusion	FCT of nearest main group fusion	Likely FCT
Site 1	3b	3b	3b
Site 2	-	Cluster with FCT 1 and 3	Undetermined
Site 3	-	Cluster with FCT 1 and 3	Undetermined
Site 4	28	20a/20c	20a
Site 5	3b	20b/3b	3b
Site 6	11/ 17	11/ 17	Undetermined
Site 7	25	11	Undetermined
Site 8	3c	3	3c
Site 9	3c	3c	3c
Site 10	3c	3	3c
Site 11	18	11	Undetermined
Site 12	18	11	Undetermined
Site 13	13	17	Undetermined
Site 14	25	11	Undetermined
Site 15	3c	3	3c
Site 16	18	11	Undetermined
Site 17	3c	3	3c



**Table 2: Results of Nearest Neighbour analysis using the Bray-Curtis dissimilarity coefficient**

Site	Nearest Neighbour (FCT)	2 <sup>nd</sup> Nearest Neighbour (FCT)	3 <sup>rd</sup> Nearest Neighbour (FCT)
Site 1	BURNRD02 (3b)	yarl03 (3b)	KOOLJ-5 (3b)
Site 2	yarl01 (3c)	WATER-3 (3c)	BULL-9 (28)
Site 3	yarl01 (3c)	WATER-3 (3c)	BULL-9 (28)
Site 4	card5 (20b)	talb9 (20c)	BULL-4 (28)
Site 5	BURNRD02 (3b)	KOOLJ-5 (3b)	yarl04 (20b)
Site 6	PAGA-5 (17)	WOODV-2 (28)	low04 (21a)
Site 7	hymus01 (11)	MILT-2 (13)	ELLIS-1 (17)
Site 8	KERO-1 (24)	WATER-3 (3c)	DUCK-1 (3c)
Site 9	WATER-3 (3c)	BURNRD02 (3b)	AMBR-1 (1b)
Site 10	BURNRD02 (3b)	yarl03 (3b)	DEPOT-1 (28)
Site 11	BULL-1 (28)	WATER-3 (3c)	card8 (20b)
Site 12	BULL-1 (28)	card8 (20b)	WATER-3 (3c)
Site 13	MILT-2 (13)	PAGA-5 (17)	hymus01 (11)
Site 14	hymus01 (11)	yarl01 (3c)	ELLEN-7 (6)
Site 15	KERO-1 (24)	WATER-3 (3c)	DUCK-1 (3c)
Site 16	cool 09 (19b)	BULL-1 (28)	YALG-4 (27)
Site 17	yarl01 (3c)	brick6 (3a)	WATER-3 (3c)

**Table 3: Results of Nearest Neighbour analysis using the Hellinger dissimilarity coefficient**

Site	Nearest Neighbour (FCT)	2 <sup>nd</sup> Nearest Neighbour (FCT)	3 <sup>rd</sup> Nearest Neighbour (FCT)
Site 1	BURNRD02 (3b)	yarl03 (3b)	AMBR-1 (1b)
Site 2	yarl01 (3c)	BULL-9 (28)	WATER-3 (3c)
Site 3	yarl01 (3c)	BULL-9 (28)	WATER-3 (3c)
Site 4	card5 (20b)	talb9 (20c)	BULL-4 (28)
Site 5	yarl04 (20b)	BURNRD02 (3b)	KOOLJ-5 (3b)
Site 6	WOODV-2 (28)	low04 (21a)	card9 (20b)
Site 7	hymus01 (11)	MILT-2 (13)	ELLIS-1 (17)
Site 8	KERO-1 (24)	WATER-3 (3c)	AMBR-1 (1b)
Site 9	WATER-3 (3c)	BULL-4 (28)	AMBR-1 (1b)
Site 10	BURNRD02 (3b)	yarl03 (3b)	wicher01_1a
Site 11	BULL-1 (28)	BULL-4 (28)	card5 (20b)
Site 12	BULL-1 (28)	BULL-4 (28)	card5 (20b)
Site 13	hymus01 (11)	MILT-2 (13)	PAGA-5 (17)
Site 14	hymus01 (11)	yarl01 (3c)	ELLEN-7 (6)
Site 15	KERO-1 (24)	WATER-3 (3c)	AMBR-1 (1b)
Site 16	BULL-1 (28)	YALG-2 (26b)	BULL-4 (28)
Site 17	brick6 (3a)	AMBR-1 (1b)	YOON-1 (1b)

### 3 Discussion

The results the Forrestfield analyses are somewhat equivocal due to the high proportion of weed species in the data. Non-hierarchical assignment of plots to an existing classification is usually the most robust and consistent approach. However, due to the low native species richness, the results of this approach for the Forrestfield site were unreliable.

The assignment of FCTs for many of the plots using hierarchical analysis were also unclear, many sites being undetermined. However, where a plausible assignment was obtained, it was indicated that most of the vegetation within the Forrestfield site is possibly either FCT 3b '*Corymbia calophylla* – *Eucalyptus marginata* woodlands on sandy clay soils of the southern Swan Coastal Plain' or 3c '*Corymbia calophylla* – *Xanthorrhoea preissii* woodlands and shrublands, Swan Coastal Plain'. Both units can be expected to be present as Site 5 contained *Bossiaea eriocarpa*, which is absent from FCT 3c but differentiates FCT 3b from the other subgroups of FCT 3. A different result was indicated for Site 4. The first fusion is with sites from FCT 28, but this FCT occurs mainly on the Spearwood dunes and is unlikely to be correct. A more probable assignment would be to FCT 20a '*Banksia attenuata* woodlands over species rich dense shrublands', but this does not appear to be a close relationship. All three units are known to occur on the eastern side of the Swan Coastal Plain.

All FCTs 3b, 3c and 20a are listed as Threatened Ecological Communities (TECs) under criteria set by the Department of Parks and Wildlife and endorsed by the Minister for Environment. FCT 3b is categorised as Vulnerable, FCT 20a as Endangered and FCT 3c as Critically Endangered. This suggests that most, if not all, the remnant native vegetation within the Forrestfield site may be considered as being a TEC, although the data indicates that the condition of the site is poor.

The results of the Nearest Neighbour analysis were similar for both distance measures and generally supported the results of the hierarchical clustering, as many neighbouring sites are from either FCT 3b or 3c.

### 4 Summary

The results of the FCT analysis are equivocal and no definite conclusion could be reached from the data due to the low native species richness within the site. Where plausible results could be obtained from the hierarchical analysis, it was indicated that the communities present at the Forrestfield site are possibly be either FCT 3b or FCT 3c.

If you have any queries please do not hesitate to contact me.

Sincerely yours,



Dr Shane Chalwell  
Plantecology Consulting.

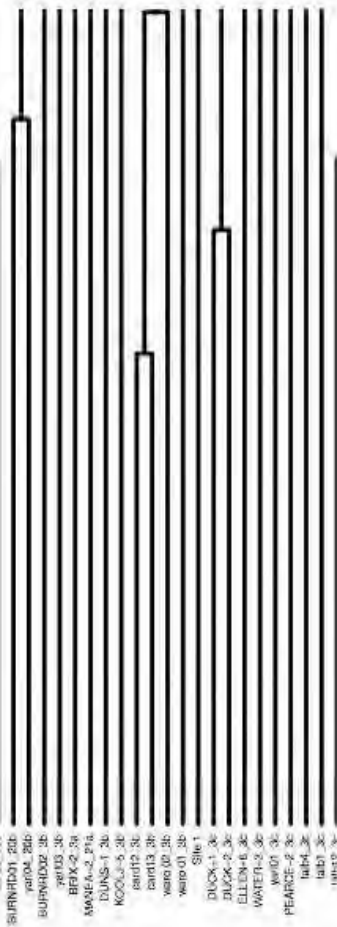


Figure 1: Hierarchical clustering dendrogram showing position of Site 1 (only relevant section shown). FCT membership for original SCP sites appended to the plot name.

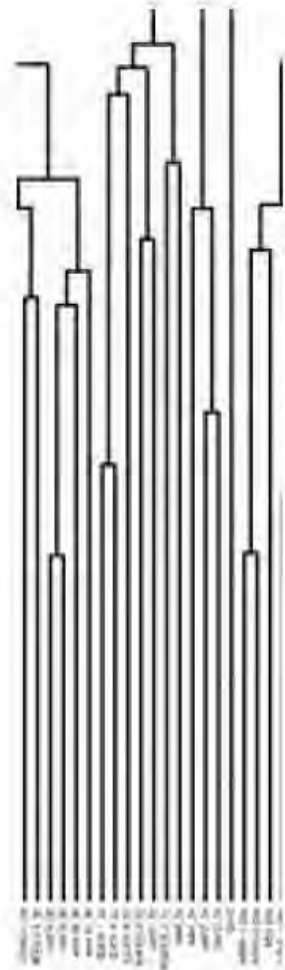


Figure 2: Hierarchical clustering dendrogram showing position of Site 2 (only relevant section shown). FCT membership for original SCP sites appended to the plot name.

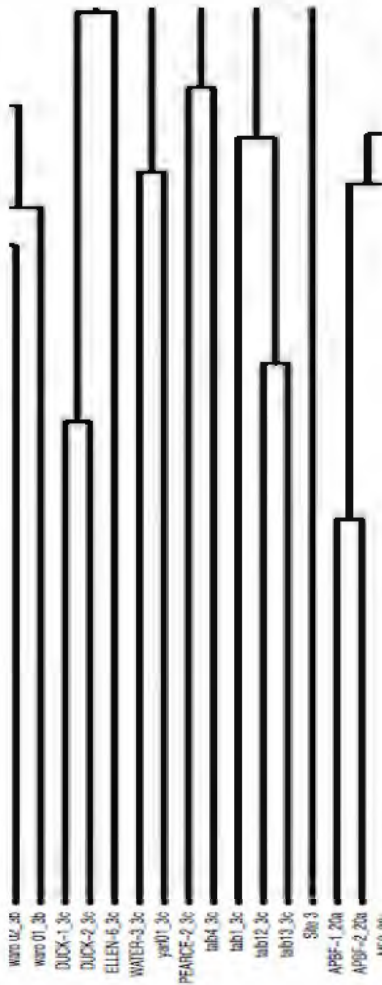


Figure 3: Hierarchical clustering dendrogram showing position of Site 3 (only relevant section shown). FCT membership for original SCP sites appended to the plot name.

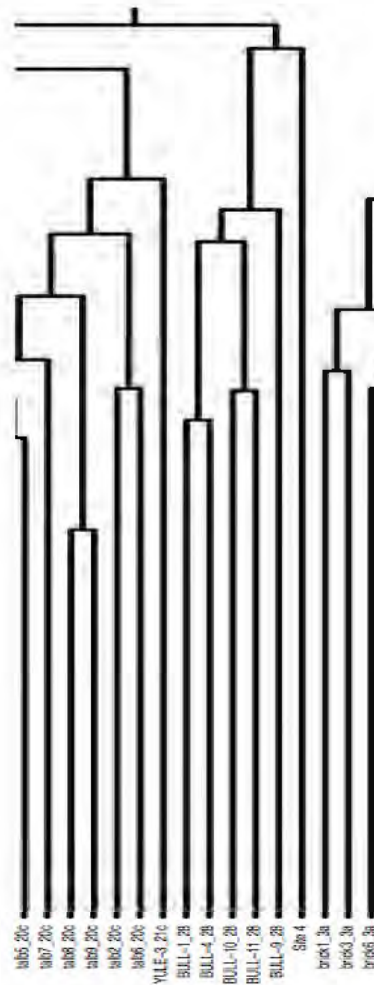


Figure 4: Hierarchical clustering dendrogram showing position of Site 4 (only relevant section shown). FCT membership for original SCP sites appended to the plot name.

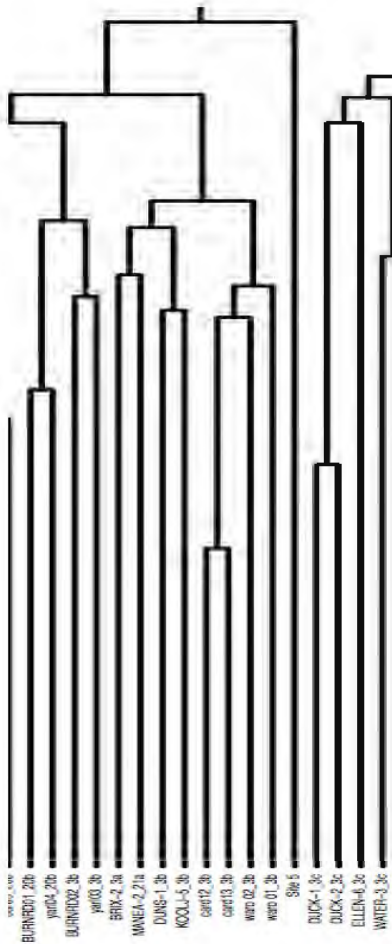


Figure 5: Hierarchical clustering dendrogram showing position of Site 5 (only relevant section shown). FCT membership for original SCP sites appended to the plot name.

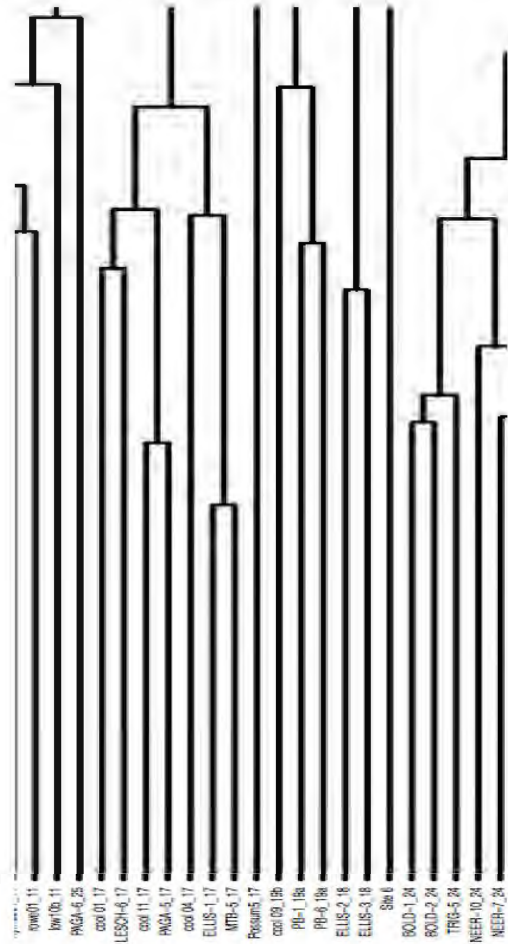


Figure 6: Hierarchical clustering dendrogram showing position of Site 6 (only relevant section shown). FCT membership for original SCP sites appended to the plot name.

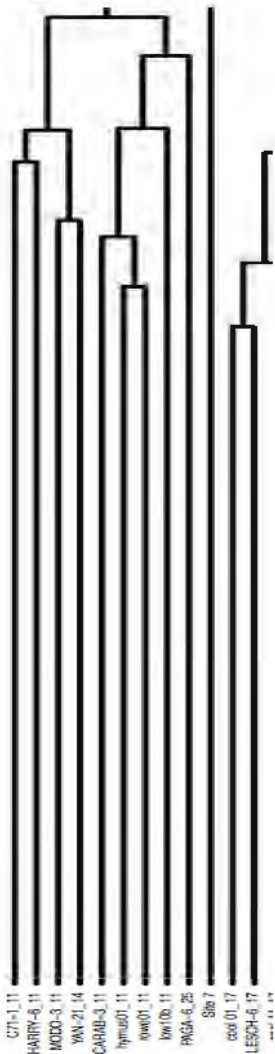


Figure 7: Hierarchical clustering dendrogram showing position of Site 7 (only relevant section shown). FCT membership for original SCP sites appended to the plot name.

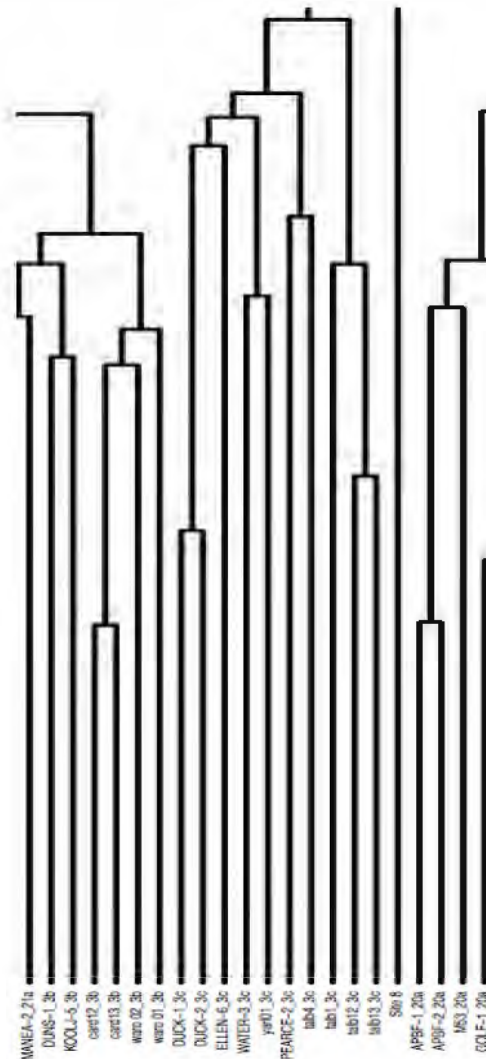


Figure 8: Hierarchical clustering dendrogram showing position of Site 8 (only relevant section shown). FCT membership for original SCP sites appended to the plot name.

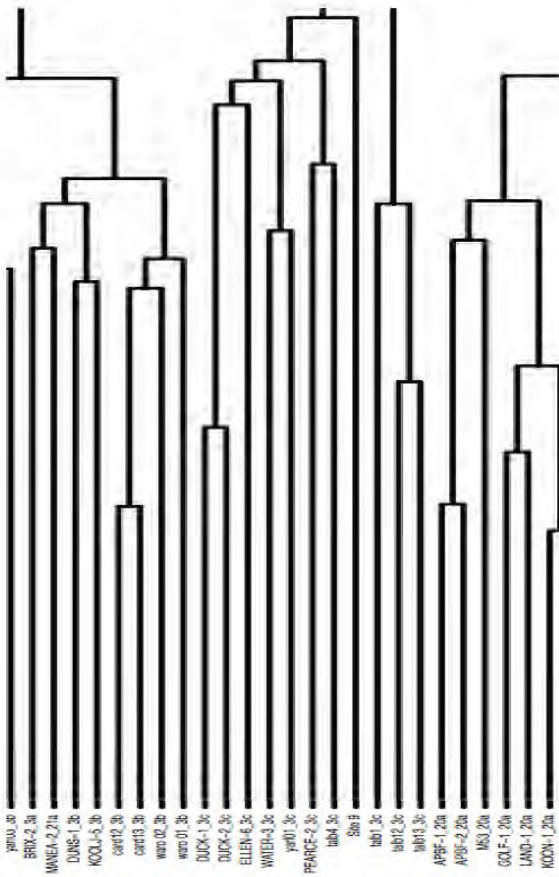


Figure 9: Hierarchical clustering dendrogram showing position of Site 9 (only relevant section shown). FCT membership for original SCP sites appended to the plot name.

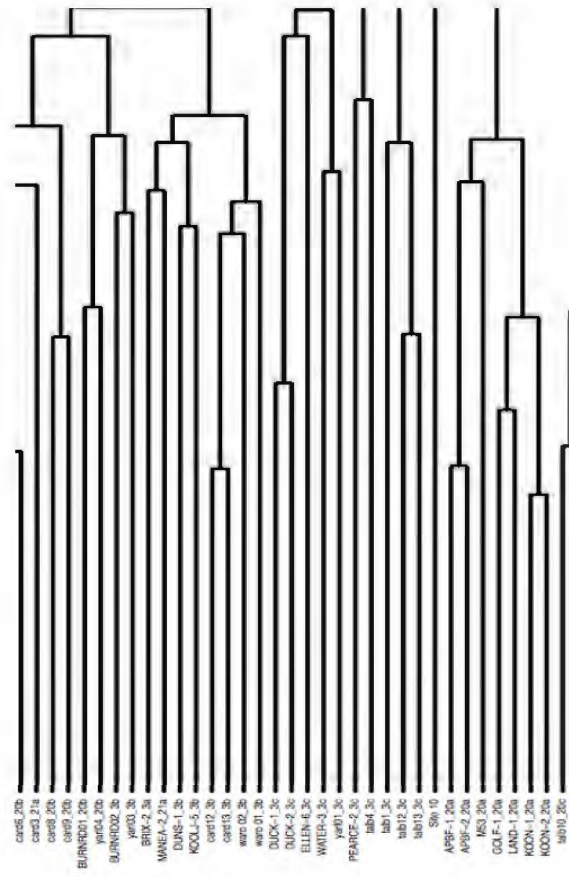


Figure 10: Hierarchical clustering dendrogram showing position of Site 10 (only relevant section shown). FCT membership for original SCP sites appended to the plot name.

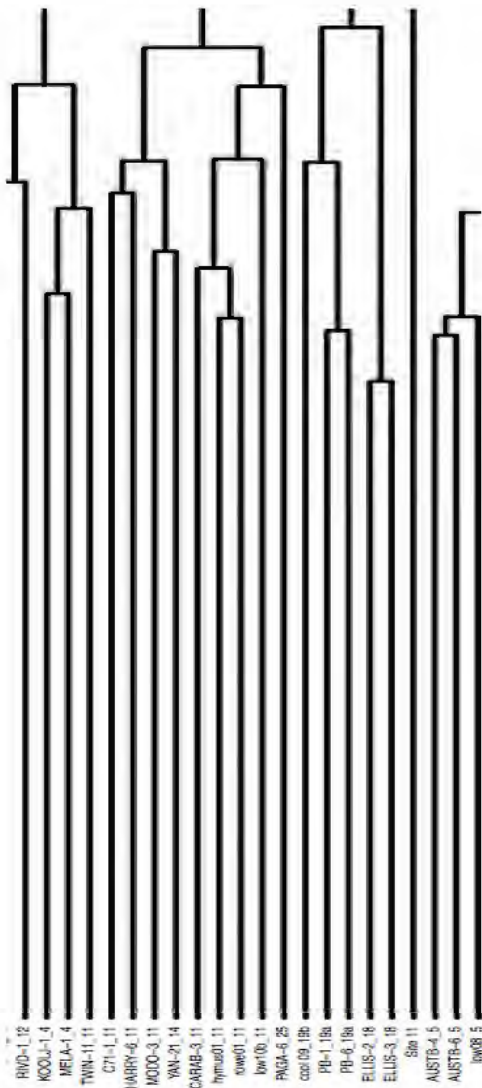


Figure 11: Hierarchical clustering dendrogram showing position of Site 11 (only relevant section shown). FCT membership for original SCP sites appended to the plot name.

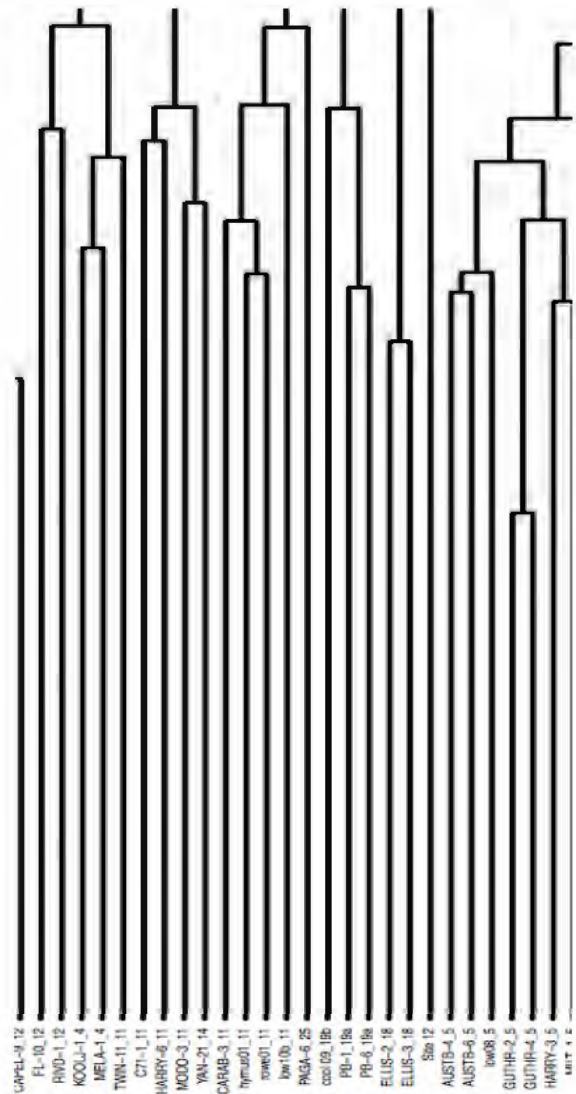


Figure 12: Hierarchical clustering dendrogram showing position of Site 12 (only relevant section shown). FCT membership for original SCP sites appended to the plot name.



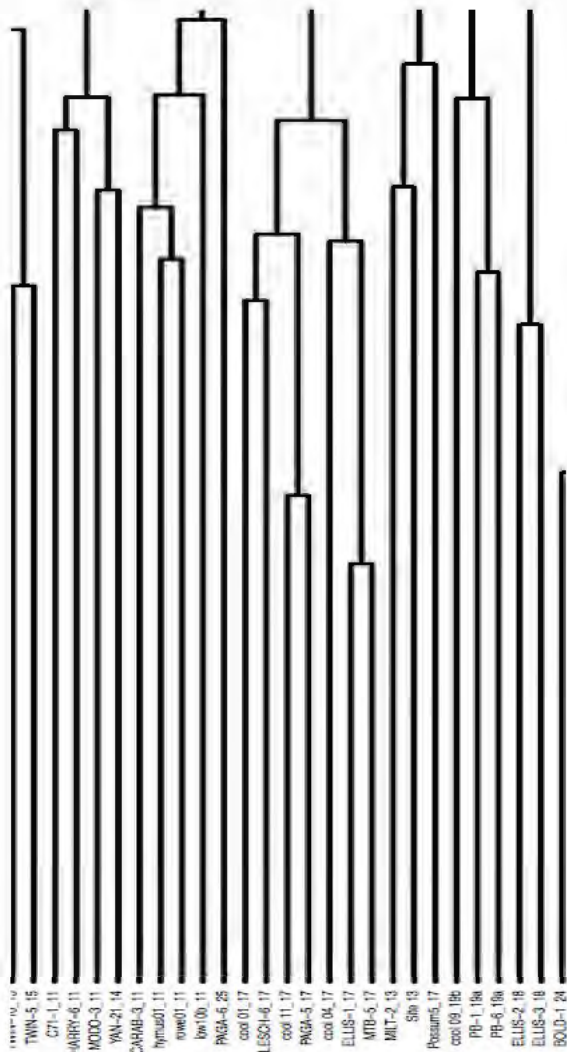


Figure 13: Hierarchical clustering dendrogram showing position of Site 13 (only relevant section shown). FCT membership for original SCP sites appended to the plot name.

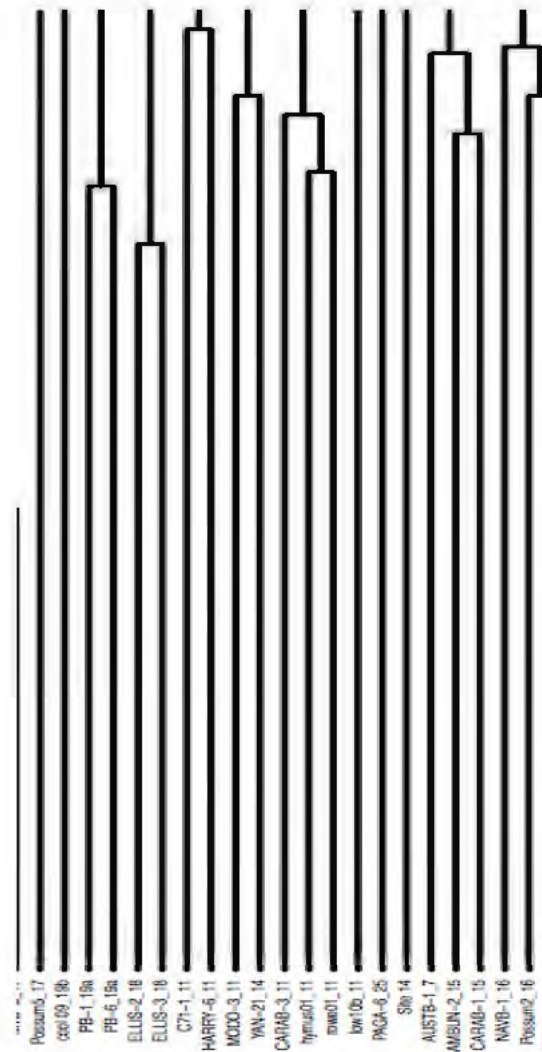


Figure 14: Hierarchical clustering dendrogram showing position of Site 14 (only relevant section shown). FCT membership for original SCP sites appended to the plot name.

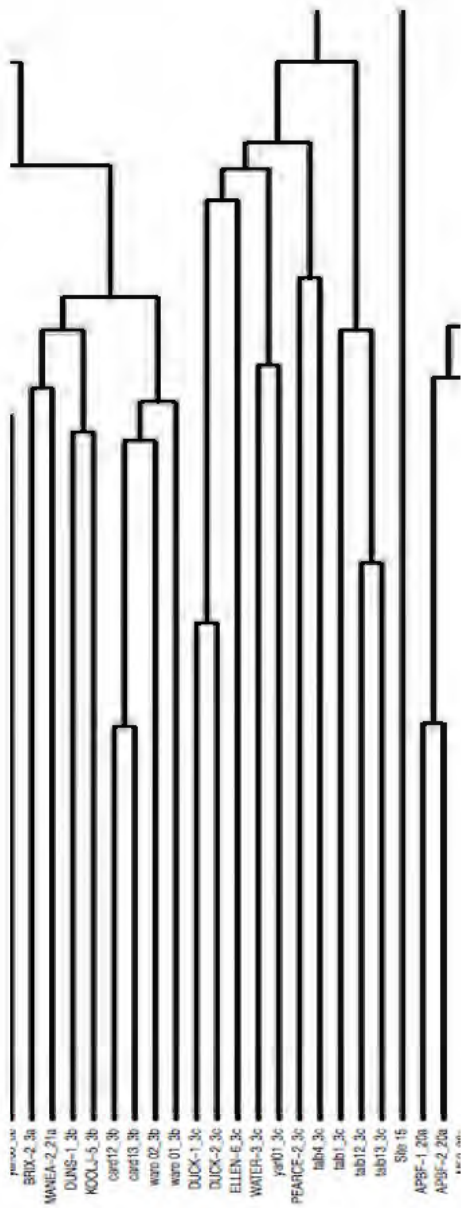


Figure 15: Hierarchical clustering dendrogram showing position of Site 7 (only relevant section shown). FCT membership for original SCP sites appended to the plot name.

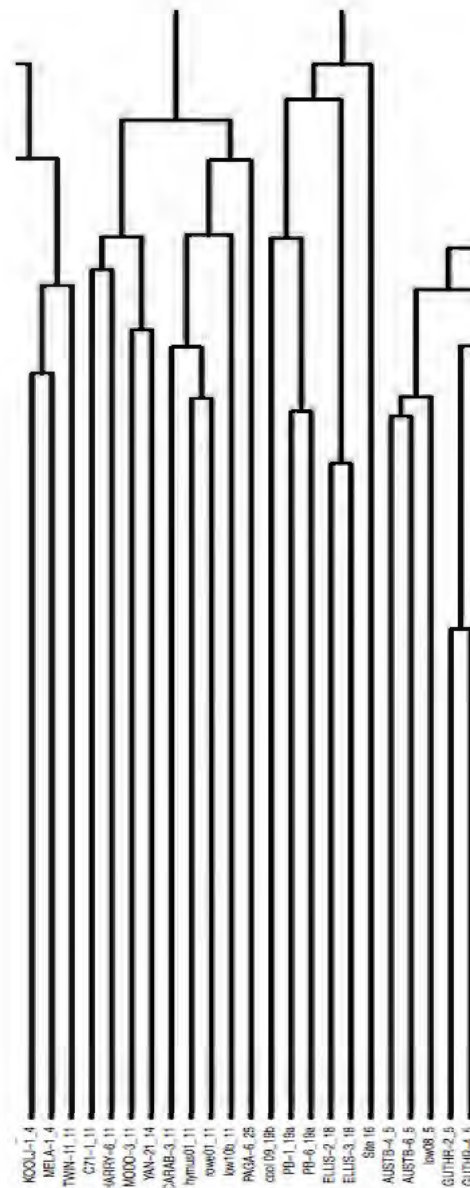


Figure 16: Hierarchical clustering dendrogram showing position of Site 16 (only relevant section shown). FCT membership for original SCP sites appended to the plot name.

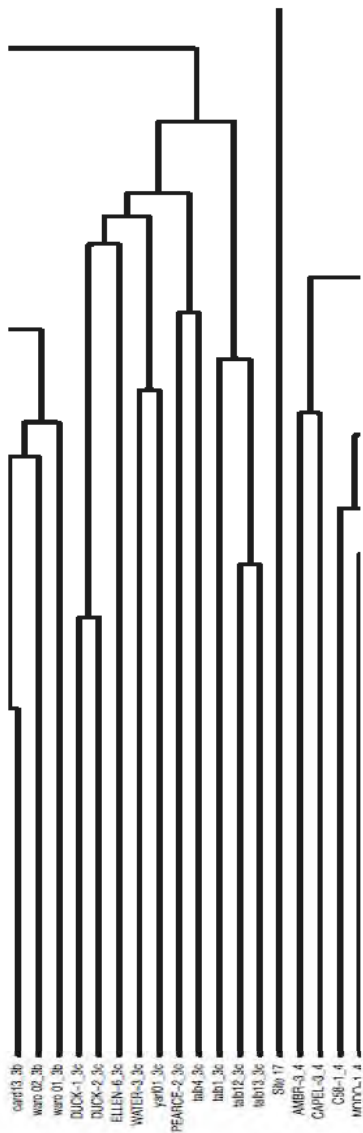


Figure 17: Hierarchical clustering dendrogram showing position of Site 17 (only relevant section shown). FCT membership for original SCP sites appended to the plot name.



50 New Cross Rd  
Kingsley, WA 6026  
T 0429 061 094  
E [shane@plantecology.com.au](mailto:shane@plantecology.com.au)

ABN 18 849 210 133

## 5 References

De Cáceres, M and Wisser, S.K. (2012) Towards consistency in vegetation classification, *Journal of Vegetation Science*, 23: 387-393

Gibson, N, Keighery, BJ, Keighery, GJ, Burbidge, AH and Lyons, MN (1994), *A floristic survey of the southern Swan Coastal Plain*, Unpublished Report for the Australian Heritage Commission prepared by the Department of Conservation and Land Management and the Conservation Council of Western Australia (Inc), Perth.

Hi Lyn,

Unfortunately, we are not prepared to undertake a part purchase of your property for the following reasons:

1. the complex shape of the area to be rezoned under pending Region Scheme Amendment presents a problematic fence off area;
2. significant existing improvements encroach this internal re-zoning boundary; and
3. the internal re-zoning boundary is not considered to have appropriate setback from the residence, to enable the required fencing off to occur.



The valuers will provide a whole property value. Please advise today if you wish not to proceed with the valuations, or this volunteer negotiation, to enable us to cancel the Property Valuers in appropriate time.

Regards

**Andrew Mill** | Manager Strategy | Heritage and Property Services  
140 William Street, Perth WA 6000  
6551 9127 |  
[www.dplh.wa.gov.au](http://www.dplh.wa.gov.au)



The department is responsible for planning and managing land and heritage for all Western Australians – now and into the future

*The department acknowledges the Aboriginal peoples of Western Australia as the traditional custodians of this land and we pay our respects to their Elders, past and present.*

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**From:** Lyn De Reggi [<mailto:l.dereggi@iinet.net.au>]  
**Sent:** Friday, 25 September 2020 12:00 PM  
**To:** Tim Hillyard <[Tim.Hillyard@dplh.wa.gov.au](mailto:Tim.Hillyard@dplh.wa.gov.au)>; Andrew Mill <[Andrew.Mill@dplh.wa.gov.au](mailto:Andrew.Mill@dplh.wa.gov.au)>; Jenni Johnston <[Jenni.Johnston@dplh.wa.gov.au](mailto:Jenni.Johnston@dplh.wa.gov.au)>  
**Subject:** 80 Brae Road.

Good morning, our property is being valued by the two assigned valuers on Tuesday, we would appreciate the requested information from the previous email before this occurs. We also ask that the valuers be instructed to value our property two ways, the POS and the Environmental Conservation area separately and together. We understand our home is situated on the POS, so we request the home be also valued separately. If we choose not to sell our Property until a later date, we will then know the percentages of the two areas. The City of Kalamunda have not been forthcoming with this information. We also request to see the survey report on how this break up of our land has been determined.

Sincerely,

Lynette De Reggi and Peter Miles.

Section 57 Amendment (Minor)  
Form 57

Submission

Metropolitan Region Scheme Amendment 1282/57

Forrestfield-High Wycombe Precinct 3

OFFICE USE ONLY

SUBMISSION NUMBER

RLS/0526/1

To: Secretary  
Western Australian Planning Commission  
Locked Bag 2506  
PERTH WA 6001

Name ALTUS PLANNING & APPEALS  
(PLEASE PRINT CLEARLY)

Address PO BOX 373, VICTORIA PARK WA Postcode 6979

Contact phone number 9470 9447 Email address CONTACT@ALTUSPLAN.COM.AU

**Submission** (Please attach additional pages if required. It is preferred that any additional information be loose rather than bound)

PLEASE REFER TO ATTACHED SUBMISSION PREPARED ON BEHALF  
OF THE LANDOWNERS OF LOT 82 (NO. 80) BRAE ROAD, HIGH WYCOMBE.

turn over to complete your submission

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You should be aware that:

- The WAPC is subject to the *Freedom of Information Act 1992* and as such, submissions made to the WAPC may be subject to applications for access under the act.
- In the course of the WAPC assessing submissions, or making its report on these submissions, copies of your submission or the substance of that submission, may be disclosed to third parties.

**To be signed by person(s) making the submission**

Signature .....  ..... Date ..04/09/2015.....

**Note: Submissions MUST be received by the advertised closing date, being close of business (5pm) on 4 SEPTEMBER 2015. Late submissions will NOT be considered.**



4 September 2015

Secretary  
Western Australian Planning Commission  
Locked Bag 2506  
PERTH WA 6001

Via email: [mrs@planning.wa.gov.au](mailto:mrs@planning.wa.gov.au)

Dear Sir/Madam,

**SUBMISSION ON METROPOLITAN REGION SCHEME AMENDMENT 1282/57 – FORRESTFIELD-HIGH WYCOMBE PRECINCT 3**

Please find below a submission on the Metropolitan Region Scheme ('MRS') Amendment 1282/57 – Forrestfield-High Wycombe Precinct 3 ('proposed amendment'). This submission is prepared by Altus Planning and Appeals under instruction from Ms Lynette De Reggi and Mr Peter Miles, the landowners of Lot 82 (No. 80) Brae Road, High Wycombe ('the subject land' or 'land').

The purpose of this submission is to request the whole of the subject land being included in the 'Urban' zone rather than a portion, as currently depicted on Amending Plan 3.2613.

*The subject land and landowner history*

The subject land exists to the north-west of the intersection of Brae and Brand Roads, High Wycombe, abutting the reserve for Poison Gully Creek, and measures approximately 1ha (refer to aerial and cadastre mapping extract at **Attachment 1**). The subject land is also partly contained within 'Bush Forever Site No. 45 – Poison Gully Bushland, High Wycombe'.

Ms De Reggi & Mr Miles purchased the subject land in 2005 following communications with the Shire of Kalamunda ('the Shire'). During these communications, our clients were advised that Lot 67 (No. 79) Brae Road, to the south-west, was to be purchased by the Shire and subsequently reserved 'Parks and Recreation' due to its designation as part of Bush Forever Site No. 45, however they were not informed that the subject land was similarly affected by this same designation. Furthermore, the Certificate of Title for the subject land is devoid of any reference to Bush Forever Site No. 45 and the Bush Forever Department have also acknowledged to our clients that the notification advising that the land was partly designated as Bush Forever Site No. 45 was incorrectly sent to the previous landowner. Accordingly, our clients only became aware of the Bush Forever designation through this MRS Amendment process and a subsequent meeting held with officers from the Shire and the Western Australian Planning Commission ('WAPC').

### Planning circumstances & justification

The land is currently zoned 'Rural' pursuant to the MRS and subsequently zoned 'Special Rural' pursuant to the Shire's Local Planning Scheme No. 3 ('LPS3'). Under the proposed amendment, the portion of the subject land not affected by Bush Forever Site No. 45 is to be transferred from the 'Rural' zone to the 'Urban' zone under the MRS (refer to extract from Amending Plan 3.2613 at **Attachment 2**). In fact, we note that all of Bush Forever Site No. 45 has been excluded from the proposed amendment.

Prior to now, the area subject of this amendment was to be rezoned 'Urban' under the MRS but for the purposes of being zoned 'Industrial Development' under LPS3 for the purposes of Stage 3 of the Forrestfield/High Wycombe Industrial Area. However, following the State Government's announcement of the Forrestfield rail station in 2014 as part of the Forrestfield-Airport Link, the Shire was requested to consider the implications and to prepare a new District Structure Plan to capitalise on the Forrestfield train station, which it has now commenced in the form of the Forrestfield North District Structure Plan ('Forrestfield North DSP'), and hence this proposed amendment. Under the former proposal there appeared to be no indication that the portion of land affected by the Bush Forever designation would be excluded from the 'Urban' zone.

As stated, the purpose of this submission is to request that the whole of the subject land be included in the 'Urban' zone, notwithstanding the current Bush Forever designation.

### *Quality/existence of vegetation*

Notwithstanding that the Amendment Report states that an environmental assessment of the proposed amendment area was undertaken, our clients submit that the vegetation on-site is not worthy of its inclusion as part of a Bush Forever site and that due to their stocking of sheep at the subject land, the understorey has been degraded. It is also our understanding that part of the land was cleared by the previous landowner following approval by the Shire to do so (refer to site photos at **Attachment 3**).

In reviewing the Amendment Report it is our understanding that Bush Forever Site No. 45 is believed to contain 'The Wavy-leaved Smokebush (*Conospermum undulatum*)' however our clients' have advised us that, to the best of their knowledge, such vegetation does not exist on the subject land. It is evident that the Shire has similar concerns regarding the state of the vegetation on the subject land and its status as a Bush Forever site, and has subsequently agreed to undertake an environmental assessment in the forthcoming spring season, with the intention of providing results/advice to the WAPC prior to its decision on the proposed amendment (refer to Shire of Kalamunda Bush Forever Sites Discussion Minutes at **Attachment 4**).

Should the Shire be unable to undertake the environmental assessment or provide the results prior to the determination of the proposed amendment, we are of the view that this should not delay the processing of the amendment; the entire subject land can be rezoned 'Urban' with subsequent structure planning dictating where development is to be avoided, should the Shire's study find remnant vegetation on-site that is worthy of retention.

#### *Urban interface*

Transferring the whole of the subject land into the 'Urban' zone affords the Shire with the opportunity to establish a clear regime for providing a consistent interface along Poison Gully Creek through the structure planning process; leaving the subject land and surrounding properties with a peculiar boundary does not allow for a consistent interface. If only small portions of the land remain Rural in close vicinity of the creek, there will not be any opportunity for the land to be included in any form of co-ordinated planning as it will simply remain in the ownership of current or subsequent landowners. For example, a local structure plan may require portions of land to given up at development stage for a local reserve for the creek so that it can include a dual-use path.

The subject land is currently bound by Poison Gully Creek to the north, with 'Urban' zoned land adjoining the creek line on the northern side (refer to photo 5 of **Attachment 3**), the land to the west of Raven Street is similarly zoned 'Urban' and under the proposed amendment the majority of land to the south of the creek line will be included in the 'Urban' zone as well. Accordingly, we submit that it is not a good planning outcome to retain small remnants of 'Rural' land as it opens up potential land use conflicts, particularly in a situation whereby the proposed Forrestfield station is to be located within approximately 550m of the amendment area. Land designated as part of Bush Forever Site No. 45 should be either reserved for 'Parks and Recreation' if it is deemed to be of high conservation value, or zoned 'Urban'; our clients' preference is for an 'Urban' zoning for the aforementioned reasons.

#### *Future amenity*

By retaining what are effectively rural enclaves in the midst of urbanisation the existing rural amenity is greatly impacted. Furthermore, there are also potential land use conflicts, not so much by the rural activities imposing on the urban development but rather the other way around. The rural properties will no longer enjoy their separation distances to adjoining development, there will be increased traffic movements, increased noise, increased light spill, etc., all of which are uncharacteristic of the existing rural environment.

#### *Planning with proposed urban/rural boundary*

Notwithstanding our position that the subject land should be completely rezoned 'Urban', we submit that any division between the 'Urban' and 'Rural' zones should follow a cadastre boundary rather than a peculiar shaped boundary, as is the case with the subject land (refer to extracts of Amending

Plan 3.2613 at **Attachment 2**). We submit that to plan for the urban/rural boundary as it is currently proposed is almost impossible at this scale.

Additionally, it is our view that all of the land (including any urban portions) would be less likely to be acquired by a developer for development and coordinated planning, thereby disadvantaging the landowners in comparison to their adjoining neighbours. Retaining an urban/rural split could be possible however it would require a far greater developable portion of land and/or a more regular (linear) division.

#### *Landowner implications*

Under the Bush Forever planning framework, landowners are only compensated in scenarios where their land is to be reserved for 'Parks and Recreation'. Therefore, by retaining pockets of 'Rural' land to reflect the Bush Forever designation, our clients and other landowners within the amendment area are unfairly compromised as they will not receive compensation, nor are they afforded the same development potential as adjoining landowners under the Forrestfield North DSP.

Notwithstanding their own circumstances were that they were not advised of how Bush Forever Site No. 45 affected their land, the landowners now understand the broader principles of how Bush Forever is meant to operate. We submit that whilst land remains 'Rural' in a locality, Bush Forever often has no direct impact on the use of the land or the aspirations for it in the future. The current situation is wholly different; with the advent of urbanization, it is now prejudicial to their amenity, in addition to their inability to develop like their adjoining neighbours.

#### Conclusion

In summary, this submission supports Lot 82 (No. 80) Brae Road, High Wycombe being included in the 'Urban' zone pursuant to the MRS however we request that the proposed amendment includes the entire lot. We submit that the vegetation on-site does not warrant the Bush Forever designation and that future development of the land would be constrained if the proposed amendment were to be approved in its current form.

Accordingly, for all of the reasons discussed in this submission, we submit the following:

1. All of the subject land should be rezoned 'Urban'; and
2. Any portion of the subject land not included in the 'Urban' zone should be reserved for 'Parks and Recreation'.

We appreciate that the tenor of this submission is largely orientated to the concerns with Bush Forever Site No. 45 which should be dealt with as a separate process, for the reasons expressed it now has enormous repercussions for the urbanization of the locality as evidenced in this amendment.

To simply follow the Bush Forever boundary for the purposes of rezoning the land is naïve, crude and not good planning.

We thank you for the opportunity to provide comment on the proposed amendment. Should you have any queries or wish to discuss this submission further, please do not hesitate to contact this office on the details provided below.

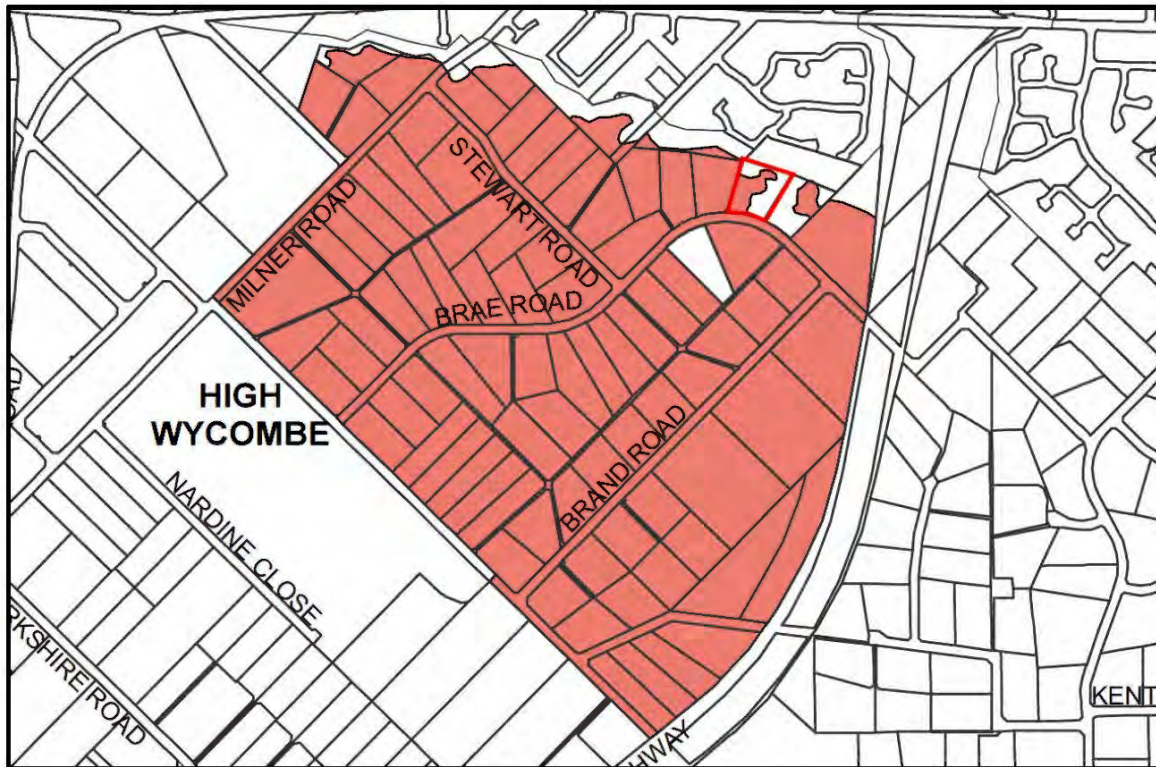
Yours faithfully,



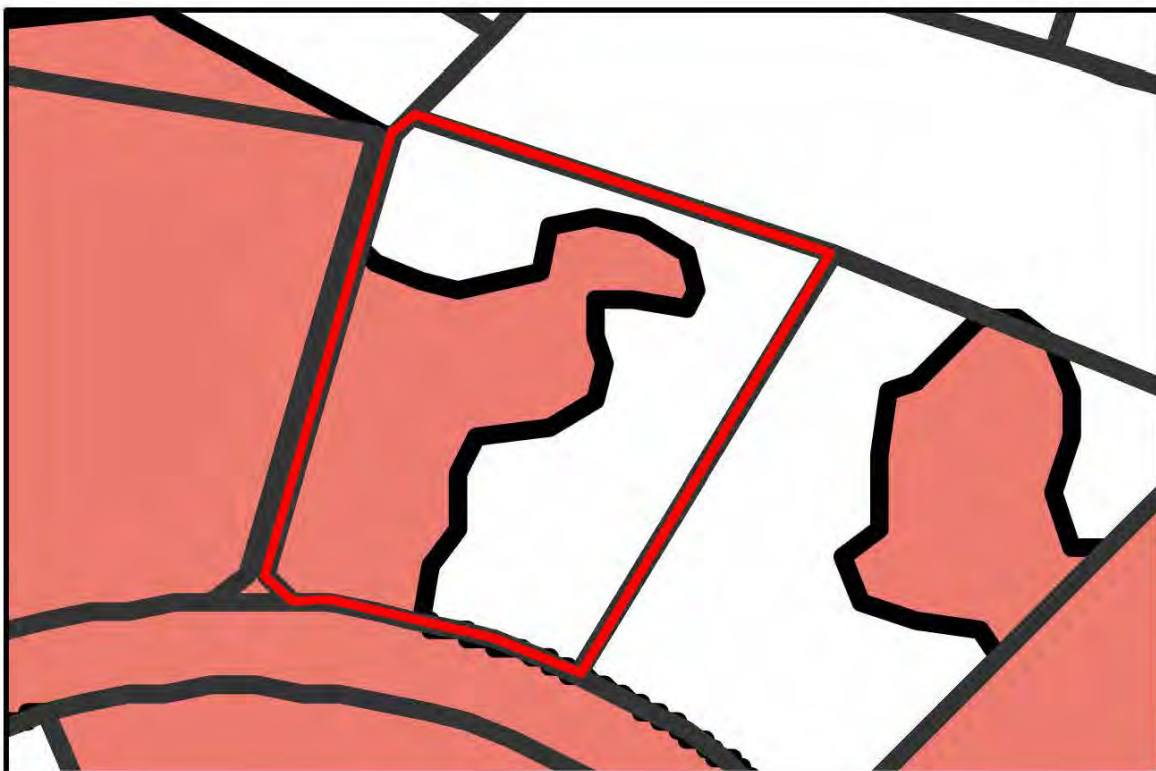
**Joe Algeri**  
Director



Aerial/Cadastral overlay of subject land (in yellow) and the surrounding properties  
(Source: Landgate's MapViewer 2015)



Extract of Amending Plan 3.2613 with the subject land outlined in red



Close-up extract of Amending Plan 3.2613 with subject land outlined in red



Photo 1: A view of the subject land from the street



Photo 2: Sheep grazing in front paddocks





Photo 3: A view of the subject land from the adjoining pedestrian access way to the west of the subject land



Photo 4: A view of the subject land from the north-western corner abutting Poison Gully Creek



Photo 5: An eastward view along the subject land's northern boundary showing the drop-off to Poison Gully Creek



Photo 6: A view towards the existing dwelling from the driveway along the eastern boundary



Photo 7: An eastward view along Brae Road



Photo 8: A westward view along Brae Road



shire of  
kalamunda

# Bush Forever Sites Discussion

## Committee Room 1 - SOK

### Minutes

**DATE:** 23 July 2015

**MEETING TIME COMMENCMENT:** 2:20pm

**MEETING TIME CONCLUDED:** 3:38pm

**ATTENDEES:**

Andrew Fowler-Tutt (AFT)	Manager Development Services
Sara Slavin (SL)	Minute Secretary
Lauren Aitken (LA)	Department of Planning
Tracey Scroop (TS)	Department of Planning
Mario Carbone (MC)	Department of Planning
Lyn De Reggi (LDR)	Landowner
Peter Miles (PM)	Landowner
Yvonne Porter (YP)	Landowner
Leanne Gates (LG)	Landowner
Tom Cicholas (TC)	Landowner
Nick Carson (NC)	Landowner
Rob Carson (RC)	Landowner
Michael Housim (MH)	Landowner

**Apologies:**

Warwick Cater (WC)

## **Introduction**

The meeting was arranged at the request of landowners whose properties have been identified under the Forrestfield North District Structure Plan (DSP) as Bush Forever Sites.

AFT provided an update on the on the planning progress of the DSP, in particular that the DSP would be considered by Council for adoption at the Ordinary Council Meeting on 24 August 2015.

LA provided a summary of the planning framework in respect to the DSP, in particular the relationship between the DSP and the Local Structure Plan process.

## **Issues Raised:**

The principle issue for all of the landowners who attended the meeting was that there land had been identified as Bush Forever and they were unclear as to how the land would be dealt with through the District Structure Planning Process.

Landowners wanted to know whether they would be compensated and what would the process be.

LR expressed concern that they were never informed when they brought their land that it was identified as Bush Forever. TC advised that letters had been sent out to landowners at the time advising that their landholding was identified as Bush Forever. It would appear that this information was not conveyed to the new owners when the land was sold.

Landowners asked if they would be forced to leave their land? The Department of Planning advised that this would not occur. However if the land was to change to Parks and Recreation the landowners would be fairly compensated and land would be purchased by the State Government.

LA advised that under the current Metropolitan Scheme Amendment presently being advertised to rezone the land from Rural to Urban to facilitate the Forrestfield North Project, land identified as Bush Forever was to remain as Rural. LA encouraged landowners to put a submission in on the proposed amendment outlining their concerns that their land was not identified as Parks and Recreation which would be the trigger for compensation for landowners or as Urban which would allow them to develop their land for residential land use when the planning for Forrestfield North is complete.

Landowners (LDR) questioned whether their land should be classified as Bush Forever given some landowners had been running livestock over their properties which had removed much of the understory.

AFT advised that the Shire would be undertaking a flora survey of the area this spring with particular focus on the Bush Forever sites. This would determine if the sites should still remain as Bush Forever. If the land is to remain as Bush Forever then the State Government would need to determine how to proceed with the land, ie change the land to Parks and Recreation and acquire the land. If the flora survey reveals the land should not be identified as Bush Forever then a decision would need to be made regarding the removal of the classification and change to an alternative zone.

MC explained the process regarding the land identified as Bush Forever acquired by the WAPC and included as Park and Recreation under the MRS.

Landowners raised concerns that their lives were on hold as they could not sell their properties and they do not have the development potential that has been identified for adjoining landowners under Forrestfield North project.

AFT advised from the Shire's perspective this project is a priority and there should be a final outcome from a planning perspective by 2017. It was noted the trains are likely to start by 2020.

LDR raised concerns when referring to a previous community meeting concerning Forrestfield North, in which she states that WC advised landowners that he had spoken with the Department on the matter and had been advised that their land would be fairly compensated as Bush Forever. It was unclear from the meeting who WC has spoken to at the Department. AFT advised that they would know more once the environmental studies have been finalised.

## **1. LATE ITEMS / OTHER BUSINESS**

Nil.

## **2. Next Meeting**

A follow up meeting will be required once the further environmental studies have been completed. Landowners will be advised of the meeting once a date has been finalised.

LDR advised she is going away for 6 weeks and will not be contactable until she is back on 15 September. Any correspondence should be done via email [l.dereggi@iinet.net.au](mailto:l.dereggi@iinet.net.au)

### **Actions:**

AFT to advise what studies have been undertaken already and what the outcomes of those were.

**Next meeting:** TBA

**Closure 3.38pm**

**40TH PARLIAMENT**



## **Report 33**

# **STANDING COMMITTEE ON PUBLIC ADMINISTRATION**

*Private property rights: the need for disclosure and fair compensation*

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Presented by  
Hon Adele Farina MLC (Chair)

September 2020

## **Standing Committee on Public Administration**

### **Members as at the time of this inquiry:**

Hon Adele Farina MLC (Chair)

Hon Darren West MLC

Hon Ken Baston MLC

Hon Jacqui Boydell MLC (Deputy Chair)

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## **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

---

- Executive summary ..... i**
  
- 1 Introduction ..... 1**
  - About the Inquiry .....1
  - About the report.....1
  - Previous inquiries .....2
  - Comment on two important matters .....5
  
- 2 Property and property rights ..... 7**
  - Introduction.....7
  - What is property?.....7
  - The nature and characteristics of property rights .....7
  - Are property rights being eroded? .....9
  
- 3 Encumbrances that affect land ..... 11**
  - Introduction..... 11
  - Land acquisition..... 11
  - Environmentally Sensitive Areas..... 12
  - Planning reservations ..... 28
  - Utility easements ..... 33
  - Bush Fire Prone Areas..... 36
  - Conclusion ..... 37
  
- 4 The need for disclosure ..... 38**
  - Introduction..... 38
  - The Torrens title system ..... 38
  - The 'threat' to the Torrens title system? ..... 40
  - Previous inquiries ..... 42
  - Shared Land Information Platform..... 44
  - An appropriate mechanism for disclosing interests?..... 48
  - Conclusion ..... 56
  
- 5 Compensation..... 57**
  - Introduction..... 57
  - What the Committee heard ..... 57
  - Injurious affection ..... 58
  - Land Administration Act..... 59
  - Planning and Development Act 2005 ..... 63
  - Where injurious affection compensation is not available ..... 81

Compensation on 'just terms' .....	91
Conclusion .....	95
<b>6 Government issued licences and authorities—water .....</b>	<b>96</b>
Introduction.....	96
Water administration in Western Australia.....	97
Proprietary rights associated with licences.....	109
Current issues .....	112
Conclusion .....	148
<b>7 Fishing licences: Current legislative scheme regarding commercial fishing .....</b>	<b>149</b>
Introduction.....	149
The Department of Primary Industries and Regional Development.....	156
Current state/health of Western Australia's fisheries .....	158
Commercial fishing under the <i>Fish Resources Management Act 1994</i> and the <i>Pearling Act 1990</i> .....	159
Compensation for loss in market value and fisheries adjustment.....	173
Conclusion .....	187
<b>8 Fishing licences: New legislative scheme regarding commercial fishing.....</b>	<b>188</b>
Introduction.....	188
Management.....	195
Transition from current legislative scheme to new legislative scheme .....	206
Conclusion .....	211
<b>Appendix 1 Submissions received and public hearings held .....</b>	<b>212</b>
<b>Appendix 2 The impact of State Government actions and processes on the use and enjoyment of freehold and leasehold land in Western Australia .....</b>	<b>219</b>
<b>Appendix 3 Petition 42—Request to repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005.....</b>	<b>257</b>
<b>Appendix 4 Fisheries Management Paper No. 165, November 2002 .....</b>	<b>262</b>
<b>Appendix 5 Fisheries Occasional Publication No. 102, November 2011 .....</b>	<b>271</b>
<b>Appendix 6 Environmental Protection (Environmentally Sensitive Areas) Notice 2005 .....</b>	<b>276</b>
<b>Appendix 7 Registrable interests.....</b>	<b>281</b>
<b>Appendix 8 Interests currently available in property interest report.....</b>	<b>283</b>
<b>Appendix 9 Planning and Development Act 2005 .....</b>	<b>287</b>
<b>Appendix 10 Licences and permits connected with water or dams .....</b>	<b>288</b>
<b>Appendix 11 Commercial fishing licences and authorisations issued under the Fish Resources Management Act 1994 and the Pearling Act 1990 Property rights and compensation ....</b>	<b>290</b>

**Appendix 12 Commercial fishing licences and authorisations issued under the Fish Resources Management Act 1994 and the Pearling Act 1990 Property rights and compensation .... 296**

**Appendix 13 Characteristics of access rights under Fish Resources Management Act 1994 Management plans, Aquatic Resources Management Act 2016 Transitioned Management Plan and Aquatic resources Management Act 2016 Managed Aquatic Resources ..... 299**

**Glossary..... 301**

**Figures**

Figure 1. *Extract from sample Property Interest Report* .....47

Figure 2. *Extract from Property Interest Report* ..... 52

Figure 3. *Portion of Caruso property compensated for* .....72

Figure 4. *Native marri trees that must be removed to replace the boundary fence* .....89

Figure 5. *Water licensing process* ..... 100

Figure 6. *Warren-Donnelly surface water plan area and subareas* ..... 115

Figure 7. *Gauging station at Manjimup Brook* ..... 120

Figure 8. *The six bioregions of Western Australia* ..... 157

Figure 9. *Ecosystem Based Fisheries Management component-tree showing ecological components divided into ecological resources/assets relevant to a bioregion* ..... 158

Figure 10. *Reduction in Western Rock Lobster unit prices*..... 172

Figure 11. *Fishing and Related Industries Compensation (Marine Reserves) Act 1997 summary of compensation process* ..... 181

Figure 12. *Aquatic resources protection, management, and allocation framework proposed for new Act to replace the Fish Resources Management Act 1994 and Pearling Act 1990* ..... 199

**Tables**

Table 1. *Property documents available for purchase* .....44

Table 2. *Income from Metropolitan Region Improvement Tax* .....65

Table 3. *General site requirements for single houses, grouped dwellings and multiple dwellings in areas coded less than R40* .....67

Table 4. *Water management legislation in Western Australia* .....97

Table 5. *Individual properties visited by subarea*..... 126

Table 6. *Recommendations, initial government response and current status*..... 220

Table 7. *Recommendations, initial Government response and current status* ..... 257

Table 8. *Recommendations, former Minister for Fisheries' proposed position at date of report, and the current Government's position*..... 262

Table 9. *Recommendations, and the current Government's position* ..... 271

Table 10. *Interests currently available in Property Interest Report* ..... 283

Table 11. *List of licences and permits that may be issued by the Department of Water and Environmental Regulation in relation to or connected with water and/or dams, and the cost of lodging an application.* ..... 288

## EXECUTIVE SUMMARY

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- 1 The right to private property has long been considered fundamental to our social and economic security. This is tempered by the fact that, with the exception of native title land, the Crown ultimately owns all land and grants only 'interests' to private individuals.
- 2 The key message received by the Standing Committee on Public Administration (Committee) was that the extent to which governments can restrict or interfere with property use and rights, without adequate consultation or compensation, is increasing. Two issues are at the core of this inquiry into Private Property Rights (Inquiry):
  - the inadequate disclosure of government interests and encumbrances that affect property
  - the inability to access fair and reasonable compensation where a government interference affects property.
- 3 The issues canvassed in this report are not new. Various inquiries and reviews have considered these matters over the past two decades. The Committee sought an update from the Western Australian Government on the implementation of previous recommendations, finding that many remain outstanding. This Inquiry has also highlighted relevant emerging issues. While precluded from inquiring into particular cases, the Committee uses a range of case studies to illustrate the systemic issues raised.

### Encumbrances affecting land

- 4 There are a range of ways that governments can lawfully interfere with private property. Such measures can have adverse effects on individual landowners. The terms of reference of this Inquiry provided encumbrances for the Committee to focus on, including Bush Fire Prone Areas and implied easements for Western Power.
- 5 While environmental protection is widely considered to be in the public interest, the Committee heard that the cost and impact is often borne predominantly by individual landowners. Environmentally Sensitive Areas (ESAs) are an example. The *Environmental Protection Act 1986* creates an offence for the unauthorised clearing of native vegetation. To prevent the incremental degradation of rare flora and wetlands, regulatory exemptions for low impact, routine land management practices do not apply in ESAs, and a clearing permit is required.
- 6 Landowners felt strongly about the impact of ESAs on their lives, livelihood and property rights. As all wetlands in the agricultural regions of Western Australia (WA) are ESAs, many pastoralists and graziers are concerned about the legality of their existing grazing practices. Affected landowners were not notified when ESAs were declared in 2005, and ESAs are not registered on Certificates of Title. To address community confusion, the Committee recommends that the WA Government clarify the legislative definition of clearing.
- 7 Governments may reserve land for public purposes, such as schools, hospitals and highways. Landowners submitted that the value of their property, their ability to use and enjoy their property, or both, have been adversely affected by planning decisions. Some landowners have been in limbo for decades, not knowing when the WA Government will choose to proceed with acquiring their land. The Committee found that planning reservations can result in prolonged uncertainty about the future use and value of land.

## Disclosure

- 8 Under the Torrens title system, a state-maintained register of land holdings guarantees indefeasible, or certain, ownership. The Certificate of Title is the official land ownership record for each parcel of land. Landowners were sometimes unaware of encumbrances on their property at the time of purchase, as they were not listed on the Certificate of Title. Submitters told the Committee that all interests, limitations, encumbrances and notifications that restrict the use or enjoyment of land should be registered or linked to the Certificate of Title. The Committee concluded that failure to do so erodes confidence in the Torrens title system.
- 9 Conversely, Landgate, the WA Government's land information agency, suggest that to register all interests on the Certificate of Title would undermine the integrity of the Torrens system. Landgate submit that the Torrens title system does not guarantee full disclosure of all interests affecting land on a Title, and an attempt to do so could potentially undermine the principle of indefeasibility.
- 10 The Committee found that Landgate has made substantial progress towards disclosing a greater range of interests in land over the past 15 years, through:
- the Shared Land Information Platform, which allows members of the public to search linked datasets through interactive maps
  - Property Interest Reports (PIRs), which list approximately 90 interests affecting land not listed on the Certificate of Title, such as heritage orders, wetlands and Bush Forever areas. Property Interest Reports are available on the Landgate website for \$60.
- 11 Though useful, the Committee found that neither of these tools can be relied on to disclose all interests affecting land. The Committee makes a number of recommendations about PIRs and the uncertainty created by unregistered interests. The Minister for Environment recently announced that the WA Government will implement one of these recommendations, adding ESAs to the list of interests reflected on a PIR.

## Compensation

- 12 Submitters to this Inquiry largely did not dispute that the WA Government may, at times, need to acquire or reserve their land. However, people feel strongly that fair and reasonable compensation should accompany such actions.
- 13 The *Land Administration Act 1997* and *Planning and Development Act 2005* provide for injurious affection compensation where landowners have suffered loss due to an acquisition or reservation. The Committee heard from landowners who were concerned with the operation of compensation arising from planning reservations in particular. The Law Reform Commission of Western Australia recommended amendments to both Acts in 2008 to improve injurious affection provisions. These recommendations remain outstanding, and the Committee recommends that the WA Government proceed to implement them.
- 14 Not every government interest or restriction affecting the use, enjoyment or value of land has an avenue for claiming injurious affection compensation. ESAs are one such example that the Committee inquired into.
- 15 Compensation for land affected by power lines is limited by statute. Recommendations from the Public Administration and Finance Committee (2004) and Law Reform Commission of Western Australia (2008) to expand access to compensation are not a priority for the WA Government, due to cost. Because current costing details are not available, the Committee recommends that the WA Government assess the potential costs.

16 The Australian Constitution requires that the Australian Government acquire property on 'just terms'. It was suggested that a similar provision should apply in WA. The Committee heard that the WA Government has investigated this option, and formed the view that such a provision would not be appropriate in the *Constitution Act 1889*. The WA Government has indicated its intention to amend the *Land Administration Act 1997* to include a reference to 'just terms'. The Committee recommends that this step be extended to all legislation enabling the WA Government to take actions impacting private property rights.

### **Licences and authorities–water**

17 The Committee inquired into the property rights of government-issued licences and authorities. Licences are not 'real property' in the same way that land is.

18 Water is one of the State's most important resources, underpinning major industries including agriculture, mining, industry and urban development. For some groups, such as farmers, the right to access water is a key and valuable asset. Water is also an increasingly scarce and vulnerable resource.

19 The *Rights in Water and Irrigation Act 1914* allows the WA Government to control and manage the State's water resources, including through licencing. The Department of Water and Environmental Regulation submit that water licences do not confer a proprietary right, as water vests in the Crown. However, licence holders are able to trade their water entitlements with other water users for a profit.

20 A number of issues with current water licensing arrangements were canvassed, including:

- the 'first in' approach to water allocation, which means newer farmers may have to rely on purchasing water from established licence-holders
- community concern about the proposed Southern Forests Irrigation Scheme
- inconsistent advice from the Department of Water and Environmental Regulation in the Warren-Donnelly catchment in relation to who is, and is not, exempt from licensing requirements
- statutory compensation provisions that have never been used.

### **Licences and authorities–fishing**

21 The Committee concluded that Government-issued commercial fishing access rights are a form of private property rights. Fish and aquatic resources in WA are managed by the State for the community's benefit. They are a shared resource not owned by any person until lawfully caught.

22 Commercial fishing (including aquaculture) contributes approximately \$1 billion annually to the State economy. Commercial fishers may be granted rights under the *Fish Resources Management Act 1994* and the *Pearling Act 1990* to take aquatic resources through authorisations (most commonly, licences) and entitlements (such as a quantity of fish) associated with those authorisations.

23 Key issues arising from the Inquiry include:

- sustainability of aquatic resources
- allocation and re-allocation of entitlements
- shifts in priority of use between consumptive users (the taking of aquatic resources in the commercial, recreational, and customary sectors)
- shifts in priority of use of the marine environment between consumptive uses (the taking of aquatic resources) and non-consumptive uses (non-fishing activities, such as marine

park establishment, harbour development, and offshore oil and gas exploration and production)

- compensation for loss in market value and fisheries adjustment.

24 Fishing law is currently under reform. The *Fish Resources Management Act 1994* and the *Pearling Act 1990* will be repealed and replaced by the *Aquatic Resources Management Act 2016*. Implementation has been delayed while an amendment is progressed through the Aquatic Resources Management Amendment Bill 2019.

25 A well-managed marine environment with secure rights provides certainty to commercial fishers. A clear understanding of the circumstances in which compensation may be available for loss in market value of authorisations and entitlements, and for adjustments to fisheries, will strengthen the industry.

### **Moving forward**

26 The Committee understands that the WA Government's ability to intervene with an individual's property is often necessary to provide infrastructure, protect the environment, and preserve sensitive resources like water and fish.

27 In conclusion, the Committee found that issues such as poor communication and a lack of transparency create uncertainty and a sense of injustice in the community. For many people, these issues relate to either their livelihood or their single biggest asset. With this in mind, the Committee's recommendations call for additional clarity, security and fairness to restore the balance between the common good and individual rights.

## **Findings and recommendations**

**Findings and recommendations are grouped as they appear in the text at the page number indicated:**

### **FINDING 1**

Page 5

Private property rights in Western Australia have been the subject of several inquiries and reviews over the past 20 years.

### **FINDING 2**

Page 9

Property rights are longstanding and fundamental to the economic security of our society.

### **FINDING 3**

Page 15

Environmentally Sensitive Areas under the *Environmental Protection Act 1986* particularly impact, or are perceived to impact, pastoralists and graziers in the agricultural regions of Western Australia.

### **FINDING 4**

Page 16

Members of the public may find it difficult to identify whether their land, or part thereof, has been declared an Environmentally Sensitive Area.



**FINDING 5**

Page 23

Due to the repeal of four Environmental Protection Policies, the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* may contain expired information, which is misleading for members of the public.

**RECOMMENDATION 1**

Page 24

Where an Environmental Protection Policy has been repealed and land is not otherwise covered by the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, the Department of Water and Environmental Regulation write to relevant landowners, notifying that their land is no longer subject to an Environmentally Sensitive Area.

**RECOMMENDATION 2**

Page 24

Following the prescription of Environmentally Sensitive Areas in the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*, the Department of Water and Environmental Regulation inform all landowners in writing that their land is an Environmentally Sensitive Area, and advise them of the potential implications if native vegetation is present.

**RECOMMENDATION 3**

Page 24

The Minister for Environment ensure expired information resulting from the repeal of Environmental Protection Policies is removed from the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*.

**RECOMMENDATION 4**

Page 25

The Premier introduce in the Parliament of Western Australia an omnibus bill amending all relevant Western Australian legislation to make it a statutory requirement for Western Australian Government departments and agencies, when making decisions or taking actions that impact on the use of a landowner's property, to notify each individual landowner impacted in writing before the decision is made or action taken, and advise how this will impact the landowners use of the land. Further, that impacted landowners be provided an opportunity to make submissions before the decision is made and/or action taken.

**FINDING 6**

Page 27

The meaning of grazing is unclear under the *Environmental Protection Act 1986*.

**RECOMMENDATION 5**

Page 27

The Minister for Environment introduce a Bill in the Parliament of Western Australia to clarify the definition of clearing under section 51A of the *Environmental Protection Act 1986*, with a view to clarifying whether grazing livestock is permissible within an Environmentally Sensitive Area.

**FINDING 7**

Page 28

Some landowners may still be unaware that there is an Environmentally Sensitive Area on their land.

**RECOMMENDATION 6**

Page 28

The Western Australia Government pay landowners impacted by an Environmentally Sensitive Area fair compensation if the value of the property is diminished by the Environmentally Sensitive Area due to the landowner being unable to use the land subject of the Environmentally Sensitive Area in accordance with its zoning use.

**FINDING 8**

Page 32

Planning reservations can result in prolonged uncertainty for landowners about the future use and value of their land.

**RECOMMENDATION 7**

Page 32

Where the Western Australian Government reserves land to be used for a public purpose, it should:

- purchase the land, if the landowner wants to sell
- or
- if the landowners does not want to sell, and the land is not immediately required by the Western Australian Government, permit the landowner to develop, use and improve the land in accordance with its existing zoning.

**RECOMMENDATION 8**

Page 33

Where a buffer zone is created and where requested by the landowner, that the Western Australian Government or the protected industries be required to purchase the land at the market value prior to the creation of the buffer zone.

**FINDING 9**

Page 36

Statutory easements may be registered on Certificates of Title, but this is not always the case.

**RECOMMENDATION 9**

Page 36

The Minister for Energy direct Western Power to include a link to Landgate's Shared Location Information Platform on its website, and inform readers that geographical information system mapping will identify whether their property is impacted by a Western Power encumbrance.

**FINDING 10**

Page 47

Landgate's Property Interest Reports contain information about a wide range of interests affecting property that are not listed on the Certificate of Title.

**FINDING 11**

Page 48

Property Interest Reports cannot be relied on to disclose all interests affecting land.

**FINDING 12**

Page 49

The Western Australian Government is unwilling and unable to guarantee the information contained in a Property Interest Report.

**FINDING 13**

Page 49

Landgate's Shared Land Information Platform and Property Interest Reports are the Western Australian Government's preferred tools for disclosing a range of interests in land.

**RECOMMENDATION 10**

Page 49

The Minister for Lands direct Landgate to inquire into and report on:

1. measures that need to be implemented and the resources required for the Western Australian Government to guarantee information contained in a Property Interest Report and on the Shared Land Information Platform is accurate and complete
2. the implications, including financial costs, for Western Australian Government agencies and landowners if the Western Australian Government were to require all government-imposed interests affecting land to be registered on the Certificate of Title.

The Minister for Lands table the report in both Houses of Parliament by June 2023.

**RECOMMENDATION 11**

Page 50

Landgate include a disclaimer on its website about the types of interests that are not included in Property Interest Reports, such as those administered by the Commonwealth Government and local governments, and some Western Australian Government interests affecting land, and where people can find information about such interests.

**RECOMMENDATION 12**

Page 50

Landgate include a disclaimer on Property Interest Reports advising that not all interests affecting land are included in the Reports or the Shared Land Information Platform.

**FINDING 14**

Page 51

Only 91 Western Australian Government-imposed interests or encumbrances affecting land are reflected in Property Interest Reports.

**RECOMMENDATION 13**

Page 51

Landgate continue cross-sector consultation to ensure data relating to all Western Australian Government interests affecting land is included in the Shared Land Information Platform.

**RECOMMENDATION 14**

Page 51

The Premier issue a Circular instructing Western Australian Government departments and agencies responsible for interests affecting land to share relevant data with Landgate.

**RECOMMENDATION 15**

Page 52

The Minister for Energy instruct energy operators to work with Landgate to ensure that energy operator easements are reflected in a clear way on Property Interest Reports and in the Shared Land Information Platform maps.

**RECOMMENDATION 16**

Page 53

The Minister for Environment direct the Environmental Protection Authority, in collaboration with Landgate, to list each individual Environmental Protection Policy in Property Interest Reports.

**FINDING 15**

Page 55

The Real Estate and Business Agents and Sales Representatives Code of Conduct requires that real estate agents and sales representatives ascertain, verify and communicate all material facts to a transaction, but are not specifically required to provide prospective buyers with a Property Interest Report.

**RECOMMENDATION 17**

Page 55

The Western Australian Government amend the Real Estate and Business Agents and Sales Representatives Code of Conduct to require that real estate agents inform clients of the option to purchase a Property Interest Report in relation to a real estate transaction.

**FINDING 16**

Page 56

The information contained in Property Interest Reports are fixed in time, and individuals are not notified of future changes.

**RECOMMENDATION 18**

Page 56

The Western Australian Government establish a service similar to TitleWatch to inform clients of updates to their Property Interest Report.

**FINDING 17**

Page 61

The Law Reform Commission of Western Australia's 2008 recommendations to amend section 241 of the *Land Administration Act 1997* have not been implemented.

**RECOMMENDATION 19**

Page 63

The Minister for Planning ensure that the new Bill to amend the *Land Administration Act 1997* implements the Law Reform Commission of Western Australia's relevant 2008 recommendations regarding compensation for injurious affection.

**RECOMMENDATION 20**

Page 73

Where funds are available in the Metropolitan Region Improvement Fund, and landowners seek acquisition of their reserved land, the Western Australian Government make additional funds available from the Metropolitan Region Improvement Fund to the Western Australian Planning Commission to facilitate the immediate purchase of the land.

**FINDING 18**

Page 75

Recommendations made by the Law Reform Commission of Western Australia in 2008 to amend the *Planning and Development Act 2005* have not yet been implemented.

**RECOMMENDATION 21**

Page 76

The Minister for Planning progress amendments to the *Planning and Development Act 2005* recommended by the Law Reform Commission of Western Australia in 2008.

**RECOMMENDATION 22**

Page 78

The Minister for Planning introduce a Bill in the Parliament of Western Australia to ensure the 'good faith' requirement does not unreasonably deprive a landowner of any avenue for compensation.

**RECOMMENDATION 23**

Page 81

The Minister for Planning bring a Bill before the Parliament of Western Australia to amend the *Planning and Development Act 2005* to clarify whether injurious affection compensation can be claimed in respect of a development application by a subsequent owner who obtained title through inheritance.

**FINDING 19**

Page 81

Injurious affection compensation is available for some government encumbrances imposed for public benefit, but not for others.

**FINDING 20**

Page 82

The cost of environmental protection as it relates to Environmentally Sensitive Areas is borne predominantly by landowners.

**FINDING 21**

Page 84

The *Country Areas Water Supply Act 1947* provides for the payment of injurious affection compensation where a licence for land clearing to preserve water catchments is refused and the land is rendered unproductive, or uneconomic, or has otherwise been injuriously affected.

**RECOMMENDATION 24**

Page 88

The Western Australian Government assess the potential costs of implementing recommendations 24 and 28 from the Law Reform Commission of Western Australia's 2008 project on compensation for injurious affection, so that the potential financial implications can be better understood, and publish a report detailing the findings of the assessment.

**FINDING 22**

Page 91

The presence of electricity transmission lines on private property may increase the costs to the landowner associated with undertaking works on the property.

**RECOMMENDATION 25**

Page 91

The Minister for Energy consider requiring Western Power to compensate landowners carrying out reasonable works on their property for any additional costs incurred as a result of electricity transmission lines on the property.

**FINDING 23**

Page 93

The Western Australian Government is of the view that a provision guaranteeing that property be acquired on just terms may not be appropriate in the *Constitution Act 1889*, and would not substantially change the operation of legislation such as the *Land Administration Act 1997*.

**RECOMMENDATION 26**

Page 94

The Western Australian Government amend section 241 of the *Land Administration Act 1997* to include a reference to 'just' compensation, as recommended by the Western Australian Law Reform Commission in 2008.

**RECOMMENDATION 27**

Page 94

The Western Australian Government amend relevant sections of all legislation which enables the Western Australian Government to take actions impacting private property rights, to require compensation on just terms.

**FINDING 24**

Page 114

Access to water in fully allocated or over-allocated water subareas is restricting horticultural activity in these subareas.

**FINDING 25**

Page 114

Water security is a real and growing issue in a drying climate.

**FINDING 26**

Page 118

Under the proposed Southern Forests Irrigation Scheme, the Southern Forests Irrigation Co-operative will licence water from the Department of Water and Environmental Regulation and distribute water between shareholders, who may then trade water amongst themselves.

**FINDING 27**

Page 127

The *Rights in Water and Irrigation Act 1914* does not provide a legislative process for determining whether a section 5 exemption applies, and does not provide that this determination must be made by the Department of Water and Environmental Regulation.

**FINDING 28**

Page 127

There are no local by-laws in relation to springs in the Warren-Donnelly catchment.

**FINDING 29**

Page 133

There is no legislative head of power for the new administrative process instigated by the Department of Water and Environmental Regulation enabling it to make a determination as to whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies.

**FINDING 30**

Page 133

The *Rights in Water and Irrigation Act 1914* expressly provides that 'spring rights' are exempt from regulation unless a by-law is enacted bringing the spring within the Act's Part 3 licensing provisions.

**FINDING 31**

Page 133

Almost four years after the Department of Water and Environmental Regulation instigated a new administrative process enabling it to make a determination on whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies, the Department is unable to provide clear and consistent details of the process even though the Department maintains that it has consistently applied the new process since late 2016.

**RECOMMENDATION 28**

Page 133

The Minister for Water commission an independent inquiry into the Department of Water and Environmental Regulations new administrative process requiring landowners to make an

application for a bed and banks permit so as to enable the Department to determine whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies. The matters to be examined by the inquiry to include:

1. the Department's legislative authority for imposing the process
2. compliance with the new process
3. the effectiveness of the process in achieving the desired outcomes
4. whether the process has been consistently applied by the Department
5. landowners concerns with the process
6. legislative changes needed to give statutory effect to the process
7. changes needed to improve the process, having regard to procedural fairness and a right of review by an independent body.

#### **RECOMMENDATION 29**

Page 133

If the Department of Water and Environmental Regulation is to persist with its new administrative process requiring landowners to make an application for a bed and banks permit so as to enable the Department to determine whether a section 5 exemption applies, the Minister for Water introduce in the Parliament of Western Australia a Bill to amend the *Rights in Water and Irrigation Act 1914*, to expressly provide for the process and for a right of review or appeal to an independent body. The Bill to also provide for the Department of Water and Environmental Regulation to establish and maintain a register of spring exemptions and spring dams.

#### **FINDING 32**

Page 135

The Department of Water and Environmental Regulation's communication with landowners in the Warren-Donnelly catchment on the new administrative process for the Department to determine whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies was tardy, lacked detail as to the mechanisms of the process and did not reach all impacted or potentially impacted landowners. Nor did it include a public communication to all in the Warren-Donnelly catchment.

#### **RECOMMENDATION 30**

Page 135

If the Department of Water and Environmental Regulation persist with this administrative process to trigger a determination by the Department on whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies, the Department write to all owners of agricultural land in the Warren-Donnelly area to inform them of the process, including details of the mechanisms of the process. Further, the Department is to issue a public notice detailing the process and its mechanisms.

#### **RECOMMENDATION 31**

Page 135

The Department of Water and Environmental Regulation immediately make its newsletters available on its website.

#### **RECOMMENDATION 32**

Page 135

The Department of Water and Environmental Regulation develop, in consultation with agricultural landowners in the Warren-Donnelly catchment, a communication strategy that identifies those



matters the Department must communicate to owners of agricultural land, commits to timely communication, and to communicate in writing directly with owners of agricultural land in the Warren-Donnelly catchment (not licensees only).

**FINDING 33**

Page 137

The *Rights in Water and Irrigation Act 1914* does not require the Department of Water and Environmental Regulation to maintain a register of spring exemptions or spring dams, as these do not require licencing and are not prescribed as part of the definition of 'instrument'.

**RECOMMENDATION 33**

Page 137

If the Department of Water and Environmental Regulation persists with its requirement that landowners make an application for a bed and banks permit to trigger a determination by the Department as to whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies, then the Department should establish and maintain a register of spring rights and spring dams. The *Rights in Water and Irrigation Act 1914* and regulations should be amended to provide for the establishment and maintenance of a register of spring rights and spring dams.

**RECOMMENDATION 34**

Page 143

The Department of Water and Environmental Regulation:

- immediately provide comprehensive training to its officers on all aspects of the *Rights in Water and Irrigation Act 1914*, not limited to those matters identified by this inquiry, and the new administrative process for the Department to determine whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies
- implement a quality assurance program to monitor the accuracy and consistency of advice provided by its officers
- develop a clear set of guidelines for Department officers to use in determining whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies
- seek independent legal advice on the Department's legislative authority to implement the new administrative process and any changes needed to improve the process, provide procedural fairness and a right of review.

**RECOMMENDATION 35**

Page 143

The Department of Water and Environmental Regulation implement a departmental policy requiring all Department officer emails providing advice of a preliminary nature or based on a desktop assessment only to clearly state:

1. the advice contained in the email is of a preliminary nature only (and based on desktop assessment only, where applicable) and should not be taken as formal or final advice and the landowner should not commence any activities based on this advice

And in relation to emails to Warren-Donnelly landowners in relation to spring rights, emails should also clearly state:

2. an onsite visit and assessment is required before the Department is able to provide a formal determination

3. to reduce the risk of being in breach of the legislation and associated enforcement activity, landowners need to ensure they have formal confirmation in writing from the Department as to whether they have spring rights before undertaking any works
4. the Department has implemented a new administrative process requiring formal assessment by the Department on whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies. Landowners must comply with the process, by making an application for a bed and banks permit in order to trigger the formal assessment by the Department.

### **RECOMMENDATION 36**

Page 144

If the Department of Water and Environmental Regulation persist with this new administrative process providing for the Department to make a formal determination on section 5 exemptions, the *Rights in Water and Irrigation Act 1914* should be amended to provide for the process and for a right of review against a decision by the Department that a section 5 exemption does not apply. Where an application for review is received by the Department, an independent hydrologist and surveyor, as agreed by the Department and the landowner, and in the absence of agreement as chosen by the landowner, are to be engaged to undertake an independent assessment on whether a section 5 exemption applies. The decision of the hydrologist and the surveyor as to whether a section 5 exemption applies shall stand. The costs are to be equally shared between the Department and the landowner.

### **FINDING 34**

Page 147

Although compensation for water licence amendment is available under the *Rights in Water and Irrigation Act 1914*, the provisions are very narrow and as a result have never been used.

### **RECOMMENDATION 37**

Page 148

The Department of Water and Environmental Regulation review and consider the effectiveness of current compensation provisions.

### **FINDING 35**

Page 152

Fish and aquatic resources are a community resource, not owned by any particular person until lawfully caught.

### **FINDING 36**

Page 153

Fish and aquatic resources in Western Australia should be managed by the State on behalf of the Western Australian community.

### **FINDING 37**

Page 155

Commercial fishing authorisations and entitlements confer only a right of access to the public resource, not a right of ownership over that resource.

**FINDING 38**

Page 158

The most recently available data from the Department of Primary Industries and Regional Development indicates that a majority of Western Australia's fish stocks are being managed sustainably and are not at risk or vulnerable through fishing.

**RECOMMENDATION 38**

Page 158

The Department of Primary Industries and Regional Development publish an updated *State of the Fisheries* report as a matter of urgency, and continue to publish such reports on an annual basis.

**FINDING 39**

Page 161

Integrated Fisheries Management sets a sustainable harvest level for a fish or aquatic resource for each sector, determining allocations between sectors, and managing each sector's take of the fish or aquatic resource within their allocation.

**FINDING 40**

Page 161

Integrated Fisheries Management is an appropriate tool for determining how fish and aquatic resources may be sustainably shared between the commercial, recreational, and customary fishing sectors.

**FINDING 41**

Page 162

Long-term sustainability of fish and aquatic resources is a paramount consideration in managing these resources.

**FINDING 42**

Page 164

Accurate data regarding fish and aquatic resource breeding stock status, and catch and effort range, is critical to determining an appropriate Total Allowable Catch for each resource.

**FINDING 43**

Page 164

Determining accurate and appropriate Total Allowable Catch for fish and aquatic resources is fundamental to ensuring sustainability of the resource.

**FINDING 44**

Page 166

The *Fish Resources Management Act 1994* provides for significant ministerial discretion in the management of the fish and or aquatic resources. Ministerial Orders and other instruments are subsidiary legislation for the purposes of the *Interpretation Act 1984*, subject to scrutiny and disallowance in the Parliament.

**FINDING 45**

Page 167

Pearling is an industry in which activities, and therefore rights, are integrated. As such, an adverse impact on the security of any particular activity or right may adversely affect another activity or right.

**FINDING 46**

Page 168

The Fisheries Legislation Service is a tool for finding information regarding which rules apply to various commercial fishing activities; however, its utility is diminished by its complexity in that a user must search numerous categories to locate all rules which apply to various commercial fishing activities.

**FINDING 47**

Page 168

The Department of Primary Industries and Regional Development does not guarantee the accuracy of the information contained in the Fisheries Legislation Service.

**RECOMMENDATION 39**

Page 168

The Department of Primary Industries and Regional Development investigate whether the Fisheries Legislation Service can be simplified so users may avoid searching numerous categories for all rules which apply to various commercial fishing activities.

**RECOMMENDATION 40**

Page 168

The Department of Primary Industries and Regional Development reform the Fisheries Legislation Service so as to guarantee the accuracy of the information contained therein.

**FINDING 48**

Page 170

Appropriate allocation of entitlements, within a Total Allowable Catch for the resource, is fundamental to sustainable management of fish and aquatic resources.

**FINDING 49**

Page 171

Decisions regarding allocation of entitlements (both within the commercial sector, and between sectors) may be more readily accepted if there is a clear understanding of the basis on which these decisions are made.

**FINDING 50**

Page 175

Compensation should not be payable to commercial fishers for the loss in market value of licences, authorisations, entitlements, or resource shares (under the *Fish Resources Management Act 1994*, the *Pearling Act 1990*, and the *Aquatic Resources Management Act 2016* as applicable) where adjustments are made solely for reasons of fish or aquatic resource sustainability.

**FINDING 51**

Page 177

Integrating compensation currently available under the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997*, *Fisheries Adjustment Schemes Act 1987*, and through ex gratia payments, as well as publishing a guideline under section 254 of the *Aquatic Resource Management Act 2016* to provide practical guidance to persons who have duties or obligations under these Acts, will improve the certainty and security of commercial fishing access rights.

**RECOMMENDATION 41**

Page 177

The Western Australian Government publish a guideline under section 254 of the *Aquatic Resource Management Act 2016* regarding compensation for commercial fishers, including but not limited to how the quantum of compensation may be determined consistently.

**RECOMMENDATION 42**

Page 177

The Minister for Fisheries investigate the utility of amending the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* and the *Fisheries Adjustment Schemes Act 1987* to allow for compensation to be paid to commercial fishers by entities which benefit from reallocation of entitlements and shift in priority of use of the marine environment and aquatic resource.

**RECOMMENDATION 43**

Page 179

The Minister for Fisheries reform legislation regarding compensation for commercial fishing by integrating the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* and the *Fisheries Adjustment Schemes Act 1987*, and conduct a review of the circumstances in which compensation is available, including when there are reallocations to non-consumptive uses such as marine parks and port development.

**RECOMMENDATION 44**

Page 179

The Minister for Fisheries investigate the utility of amending the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* and the *Fisheries Adjustment Schemes Act 1987* to allow for compensation to be paid to commercial fishers by entities which benefit from reallocation of entitlements and shift in priority of use of the marine environment and aquatic resource.

**FINDING 52**

Page 182

The Department of Primary Industries and Regional Development's Marine Reserve Compensation Process Information Sheet, January 2019, provides a useful summary to commercial fishers of the compensation processes under the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997*.

**RECOMMENDATION 45**

Page 184

The Department of Primary Industries and Regional Development produce an information sheet or similar which outlines the compensation processes under the *Fisheries Adjustment Schemes Act 1987*.

**FINDING 53**

Page 187

Expanding the scope of the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* and the *Fisheries Adjustment Schemes Act 1987* may reduce the incidence of ex gratia compensation payments which in turn may lead to more consistent compensation decision making.

**RECOMMENDATION 46**

Page 187

The Minister for Fisheries consider the circumstances in which ex gratia payments are made to commercial fishers, with a view to reducing the incidence of such payments and instead providing a clear basis for compensation eligibility in legislation and greater transparency.

**FINDING 54**

Page 194

The resource-based, risk-based, and rights-based nature of the *Aquatic Resources Management Act 2016* will increase sustainability of the aquatic resource and strengthen commercial fishing access rights.

**FINDING 55**

Page 194

The statutory regime, including the statutory consultation processes, in the *Aquatic Resources Management Act 2016* has the effect of strengthening the security of commercial fishing access rights.

# CHAPTER 1

## Introduction

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### About the Inquiry

- 1.1 On 12 June 2019, the Hon Rick Mazza MLC moved that the Legislative Council:
  - (a) recognises the fundamental proprietary right of private property ownership that underpins the social and economic security of the community
  - (b) recognises the threat to the probity of the Torrens title system, which guarantees disclosure, and re-establishes the necessity for registration of all encumbrances that affect land including environmentally sensitive areas, bushfire-prone areas and implied easements for Western Power that currently sit behind the Certificate of Title
  - (c) recognises the property rights of government-issued licenses and authorities including commercial fishing
  - (d) asserts that fair and reasonable compensation must be paid to the owner of private property if the value of the property is diminished by a government encumbrance or resumption in order to derive a public benefit
  - (e) directs the Standing Committee on Public Administration to conduct an inquiry into the matters described above - with them as its terms of reference - and to report to the House within nine months of the date of the referral.
- 1.2 The Standing Committee on Public Administration (Committee) commenced the inquiry into Private Property Rights (Inquiry) in June 2019, with the above as its terms of reference.
- 1.3 The Committee received 85 submissions and held 16 public hearings, including three hearings with groups of individual stakeholders (See Appendix 1 for a full list of submissions and hearings).
- 1.4 The Committee was to report within nine months of the date of referral. On 20 February 2020, the Legislative Council granted an extension of time to report until 24 September 2020. On 17 September 2020, a further extension was granted until 22 October 2020.

### About the report

- 1.5 The issues canvassed in this report are not new. Various inquiries and reviews have considered these matters over the past two decades. A major part of this Inquiry was obtaining an update on the implementation status of previous recommendations. In addition, the Committee has investigated and highlighted relevant emerging issues.
- 1.6 The report focusses primarily on State Government actions that affect property, although the Committee notes that the Commonwealth government and local governments also have significant impact in this space.
- 1.7 The Inquiry deals with a diverse range of complex issues, including land reservation, environmental regulation and various licensing schemes. The wide variety of evidence received reflects this complexity. All of these issues relate back to one or both of two concepts key to this Inquiry—disclosure and compensation.
  - **Chapter 2** outlines what property means, the nature and characteristics of property rights and the current erosion of those rights.
  - **Chapter 3** details the ways in which the Western Australian Government can restrict or interfere with the use and enjoyment of private property.

- **Chapter 4** sets out the perceived risk to private property rights posed by the failure to disclose Government-imposed interests and restrictions on property, and measures intended to address that risk.
  - **Chapter 5** deals with the availability of compensation in relation to Western Australian Government regulation affecting private property rights, and the case for a constitutional guarantee of property acquisition on ‘just terms’.
  - **Chapter 6** sets out the rights and current issues associated with licences to take water.
  - **Chapters 7 and 8** address the rights and current issues associated with licences to take fish.
- 1.8 The Committee’s terms of reference preclude it from inquiring into the merits of a particular case or grievance unless received as a petition.<sup>1</sup> However, where the Committee has received a significant amount of evidence about a particular issue, it has included case studies throughout this report to illustrate a point.
- 1.9 Terms and acronyms used in this report are explained in the glossary.

## Previous inquiries

- 1.10 As noted above, many of the issues canvassed in this report have been considered by Parliamentary Committees, commissions or government agencies in the past. The Committee is aware that some stakeholders have been frustrated with what they perceive to be a slow rate of progress over the years:

The PGA notes that these inquiries have made many recommendations to improve the definition and protection of private property rights, but is very disappointed that very few have been accepted or implemented by governments of any political persuasion.<sup>2</sup>

## Inquiry into the Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia

- 1.11 In 2001, the Standing Committee on Public Administration and Finance (PAF Committee) commenced an inquiry into the impact of State Government actions and processes on the use and enjoyment of freehold and leasehold land in Western Australia (WA) (2004 Inquiry).<sup>3</sup>
- 1.12 The Inquiry broadly covered:
- the nature of freehold and leasehold interests in land
  - State acquisition of land and compensation
  - mining interests over freehold and leasehold land
  - restrictions on land clearing in the agricultural region of WA
  - planning and environmental restrictions on the use of freehold and leasehold land
  - independent appeal processes in land use matters.

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<sup>1</sup> Standing Orders of the Legislative Council, Schedule 1.

<sup>2</sup> Submission 61 from Pastoralists and Graziers Association of Western Australia, 31 July 2019, p 3.

<sup>3</sup> Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7, *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004.



- 1.13 Some of the specific issues covered in the 2004 Inquiry that arose as part of the current Inquiry include:
- transmission line and water pipeline easements
  - land use zonings
  - land clearing restrictions in agricultural areas
  - environmental policies relating to urban bushland and wetland conservation
  - notification and recording of restrictions on land use.
- 1.14 Other issues were central to the 2004 Inquiry, but are not particularly relevant to the current Inquiry. These include compulsory acquisition and mining interests.
- 1.15 The PAF Committee tabled its report in May 2004, making 37 recommendations. The then-Government of WA responded, supporting 16 recommendations, supporting the principle or intent of 13 recommendations and supporting in part one further recommendation. The Government did not support seven of the recommendations.
- 1.16 In its initial response to the PAF Committee, the WA Government agreed with the general intention of the report. The WA Government identified six overriding principles and committed to consider developing and/or adopting policy to give effect to these (see Appendix 2).
- 1.17 The Committee asked the relevant WA Government Ministers to provide an update on the implementation status of each of these recommendations in 2019. For the full list of recommendations, the corresponding original WA Government response (2004) and current implementation status (2019), see Appendix 2.
- 1.18 The 2004 Inquiry is discussed throughout this report, but is particularly relevant to Chapter 5, which deals with compensation in relation to land.

#### **Law Reform Commission Project 98 – compensation for injurious affection**

- 1.19 In 2004, the PAF Committee recommended that the Attorney General refer the broad issue of compensation for injurious affection to land in WA to the Law Reform Commission of WA (WALRC) for review.
- 1.20 The WALRC issued its report on compensation for injurious affection in 2008, making 31 recommendations. The WALRC Report is of particular relevance to Chapter 5 of this Report.<sup>4</sup>

#### **Petition number 42: request to repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005**

- 1.21 In 2015, the Environment and Public Affairs Committee inquired into a petition to repeal the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, making nine recommendations.<sup>5</sup>
- 1.22 In September 2019, the Committee wrote to the Minister for Environment seeking the implementation status of the nine recommendations. Each recommendation is included in a table at Appendix 3 with the corresponding original Government response and status update.

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<sup>4</sup> Law Reform Commission of Western Australia, *Project 98: compensation for injurious affection*, 2008.

<sup>5</sup> Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 41, *Petition no. 42 – request to repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, August 2015,

1.23 The report on Petition number 42 is particularly relevant to Chapters 3 and 4 of this Report, which deal with encumbrances affecting land and how these are disclosed.

#### **Fisheries Management Paper No. 165, November 2002**

1.24 In 2002, the Integrated Fisheries Management Review Committee of the former Department of Fisheries produced a report to the former Minister for Agriculture, Forestry and Fisheries.<sup>6</sup>

1.25 The report broadly covered the:

- fishing management framework under the *Fish Resources Management Act 1994* (FRM Act)
- nature of fishing access rights and a discussion of whether these constitute private property rights
- needs of the commercial, recreational, and customary fishing sectors as they relate to sharing of the fish resource
- requirements of a new management framework in the context of Ecologically Sustainable Development (ESD).

1.26 Some of the specific issues covered in the report that arose as part of this Inquiry include:

- management objectives for fisheries
- determining sustainable fishing catch levels
- bases for determining allocations of fishing catch entitlements, including transferring allocations of entitlements between groups
- compensation.

1.27 The report made 21 recommendations and the Minister's proposed position with respect to each recommendation was published in the report. Broadly, the Minister agreed either in full or in part with the intent or principle of 16 recommendations, and disagreed with five recommendations. The report then invited the public to make submissions regarding how WA's fisheries should be managed.

1.28 The Committee asked the current Minister for Fisheries to provide an update on the current Government's position with respect to each recommendation. For the full list of recommendations, the corresponding former Minister's proposed position, and the current Government's position, see Appendix 4.

#### **Fisheries Occasional Publication No. 102, November 2011**

1.29 In 2011, an Access Rights Working Group of the former Department of Fisheries produced a report to the former Minister for Fisheries which identified key factors affecting commercial fishing, pearling, and aquaculture access rights under the FRM Act.<sup>7</sup>

1.30 The report broadly covered:

- the ownership of fish in a property rights context
- the nature of fishing access rights

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<sup>6</sup> Government of Western Australia, (then) Department of Fisheries, Fisheries Management Paper No. 165, *Report to the Minister for Agriculture, Forestry and Fisheries by the Integrated Fisheries Management Review Committee*, November 2002.

<sup>7</sup> Government of Western Australia, (then) Department of Fisheries, Occasional Publication No. 102, *Improving Commercial Fishing Access Rights in Western Australia*, November 2011.

- leases and licences for aquaculture and pearling
  - ESD
  - discussion of whether a rights-based system improves the ecological sustainability of fisheries.
- 1.31 The report found that strengthening the property characteristics of fishing access rights may lead to the following public policy and community benefits:
- improve sustainability for aquatic resources
  - a place for fishing in an increasingly crowded marine environment
  - improved security for the supply of commercially caught fish to the community
  - improved security for recreational fishing and other harvest sectors
  - improved economic and social performance from commercial fisheries
  - improved administration and allocation processes for the use of marine biological resources.<sup>8</sup>
- 1.32 The report made 19 recommendations, however the then-Government's position was not included in the report.
- 1.33 The Committee asked the current Minister for Fisheries to provide an update on the current Government's position with respect to each recommendation. For the full list of recommendations and the current Government's position, see Appendix 5.

## **FINDING 1**

Private property rights in Western Australia have been the subject of several inquiries and reviews over the past 20 years.

### **Comment on two important matters**

- 1.34 The Committee takes this opportunity to provide comment on two important matters:

#### *Evidence to Parliamentary inquiries*

- 1.35 Generally speaking, Parliamentary Committees will not publish submissions containing adverse reflections on a person or organisation rather than the merits of their argument or opinion and will not invite the writer of the submission to give oral evidence to the Committee as doing so may provide the writer with a platform on which to repeat the adverse reflections.
- 1.36 Witnesses to Parliamentary inquiries are afforded the protection of parliamentary privilege. However, they are expected to exercise this freedom responsibly. The freedom of speech afforded to witnesses to make written submissions and/or give oral evidence is not intended to provide a protected forum in which to make adverse reflections about others. Such adverse reflections are not constructive and may result in a Parliamentary Committee determining not to make the witnesses submission available on its website and not to call the witness to give oral evidence to the Committee.
- 1.37 During this Inquiry, the Committee had reason to exercise this discretion. Those aspects of the submission relevant to the Inquiry terms of reference were considered by the Committee. The Committee made no use of the adverse reflections in preparing this report. They were irrelevant to the Inquiry.

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<sup>8</sup> *ibid.*, p 34.

*Incorrect, false or misleading evidence*

- 1.38 Knowingly providing incorrect, false or misleading evidence to a Parliamentary Inquiry is a serious matter and may undermine the integrity of the Inquiry or a Parliamentary Committee's findings and recommendations to Parliament.
- 1.39 The Committee takes this opportunity to remind witnesses appearing before Committees that their evidence is given under oath (or affirmation). Witnesses should not knowingly provide incorrect, false or misleading information to Parliamentary Committees. If a witness is not sure about a question, the witness may ask for clarification of the question. Where a witness requires time to check details or to more fully consider a matter before answering a question, the witness may ask that the question be taken on notice, enabling the witness to provide the Committee with a written answer. These options should be exercised to avoid giving incorrect, false or misleading evidence.
- 1.40 The procedure followed by the Committee included:
- inviting written submissions
  - on consideration of the written submissions, determining which witnesses to call to provide oral evidence to the Committee
  - inviting certain witnesses to provide oral evidence
  - due to the number of submissions received, some hearings were held with discrete groups of submitters (witnesses), based on commonality identified in the written submissions
  - in some instances, written questions or an indication of the subject matter of questions to be put at the hearing were provided to witnesses
  - WA Government departments and agencies were invited to make opening and closing statements, and some WA Government departments and agencies were invited to attend more than one hearing to enable the Committee to delve into further detail. Some WA Government departments and agencies took questions on notice and some were provided with multiple additional questions, and in some instances on multiple occasions
  - all witnesses were provided with a copy of their transcript of evidence and invited to write to the Committee informing the Committee or any corrections to the transcript and/or to provide further clarification or further information with respect to any answer provided.
- 1.41 Knowingly making incorrect, false or misleading statements may be a breach of parliamentary privilege or a contempt of Parliament.
- 1.42 With this Inquiry, if the Committee had not sought an extension of time and persisted in asking further and further questions, it may have provided incorrect information to Parliament, which would have undermined the integrity of the Inquiry.

## CHAPTER 2

# Property and property rights

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### Introduction

- 2.1 The terms of reference required that the Committee inquire into the fundamental proprietary nature of private property ownership that underpins the social and economic security of the community.
- 2.2 This Chapter will briefly outline:
- the meaning of property
  - the nature and characteristics of property rights
  - whether property rights are being eroded.
- 2.3 For a more comprehensive treatment of these topics, the Committee refers readers to the 2004 Inquiry report.<sup>9</sup>

### What is property?

- 2.4 The *Property Law Act 1969* defines property as including:
- real and personal property and any estate or interest therein and any thing or chose in action.<sup>10</sup>
- 2.5 The distinction between these two types of property dates back to Norman times.<sup>11</sup> Real property includes interests in land and structures on land. Personal property includes physical possessions and tangible or intangible legal rights, such as leaseholds, intellectual property rights, shares and some contractual rights.<sup>12</sup>
- 2.6 When the term 'property' appears in legislation without definition, its meaning becomes a question of statutory interpretation.<sup>13</sup> The High Court has tended to take a wide view of the concept of property:
- it means any tangible or intangible thing which the law protects under the name of property.<sup>14</sup>

### The nature and characteristics of property rights

- 2.7 Individual property rights date back to the Magna Carta, and have long been considered fundamental.<sup>15</sup> Generally, a 'property right' will include some or all of the rights to:
- use and enjoy the property (also known as 'quiet enjoyment')<sup>16</sup>

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<sup>9</sup> Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7 *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004.

<sup>10</sup> *Property Law Act 1969* s 7.

<sup>11</sup> Bradbrook, MacCallum and Moore, *Australian Real Property Law*, Thomson Reuters, Pyrmont, New South Wales, 2016, p 6.

<sup>12</sup> For example, see *City of Swan v Lehman Bros Australia Ltd* (2009) 179 FCR 243.

<sup>13</sup> *ibid.*

<sup>14</sup> *Georgiadis v AOTC* (1994) 179 CLR 297.

<sup>15</sup> See, for example, William Blackstone, *Commentaries on the Laws of England* (1765).

<sup>16</sup> *Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd* (1976) 2 NSWLR 15, 23.

- exclude others from accessing or using the property (also known as 'exclusivity')<sup>17</sup>
  - sell or give away the property (also known as 'transferability').<sup>18</sup>
- 2.8 It is worth noting that the Crown (in this case, the State) ultimately owns all land, and may grant interests in land to private individuals or corporations.<sup>19</sup> Freehold title (fee simple) is the closest interest to true ownership.<sup>20</sup> The Crown's ownership of all land is qualified by rights conferred by native title.
- 2.9 As the PAF Committee noted, there are a myriad of ways in which the WA and Commonwealth governments can lawfully interfere with private property rights. Only some of these interferences attach to a right to compensation—for example, where a government acquires private land for a public purpose.<sup>21</sup>
- 2.10 In a legal sense, 'property' does not necessarily describe a thing, but a legal relationship with, or interest in, that thing.<sup>22</sup> Therefore, the term 'property' can be thought of as referring to a 'bundle of rights':
- The word 'property' is often used to refer to something that belongs to another. But ... 'property' does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of 'property' may be elusive. Usually it is treated as a 'bundle of rights'.<sup>23</sup>
- 2.11 A 'property right' may take different forms depending on the type of property.<sup>24</sup> For example, significant property rights attach to real property, such as fee simple interests in land. Less solid are the rights that attach to entitlements such as fishing and water licences. These will be discussed in more detail at Chapters 6, 7 and 8.
- 2.12 Throughout this Inquiry, the Committee heard about the fundamental importance of property rights. For example, the Pastoralists and Graziers Association of Western Australia submit that a strong system of property rights is a fundamental requirement of a capitalist economy.<sup>25</sup> According to the Joondalup Urban Development Association:
- The saying 'safe as houses' and much of the prosperity Australians have derived from property has stemmed from the security that property rights give.<sup>26</sup>
- 2.13 According to Louise Staley, Member of the Victorian Legislative Assembly and former Director at think tank the Institute of Public Affairs:
- It is not an overstatement to claim that the maintenance of private property rights is at the base of our society, wealth and safety.<sup>27</sup>

<sup>17</sup> *Radaich v Smith* (1959) 1010 CLR 209, 222.

<sup>18</sup> *Milirrpum v Nabalco* (1971) 17 FLR 141, 171.

<sup>19</sup> Bradbrook, MacCallum and Moore, *Australian Real Property Law*, Thomson Reuters, Pyrmont, New South Wales, 2016, p 4.

<sup>20</sup> Submission 69 from Landgate, 31 July 2019, p 4.

<sup>21</sup> *Land Administration Act 1997* Part 10.

<sup>22</sup> *Yanner v Eaton* (1999) 201 CLR 351, 365-6.

<sup>23</sup> *ibid.*

<sup>24</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Canberra, 2 March 2016, p 464.

<sup>25</sup> Submission 61 from Pastoralists and Graziers Association of Western Australia, 31 July 2019, p 3.

<sup>26</sup> Submission 43 from Joondalup Urban Development Association, 30 July 2019, p 2.

<sup>27</sup> Institute of Public Affairs, *Property rights in Western Australia – time for a changed direction*, report prepared by Louise Staley, Melbourne, July 2006, p 3.

- 2.14 In moving that this Inquiry be referred to the Committee, the Hon Rick Mazza MLC said that private property underpins the economic security and wealth of individuals and companies, meaning that any erosion of private property rights is ‘an erosion of the very fabric of our society’:

Property rights are linked with economic growth in the sense that they provide landowners with the security and incentive to save, invest and be a part of a community. This is especially true for farmers who make their livelihoods off the land. Most people aspire to own their own homes, and the family home is generally the single biggest asset that people have.<sup>28</sup>

## **FINDING 2**

Property rights are longstanding and fundamental to the economic security of our society.

### **Are property rights being eroded?**

- 2.15 Most people accept that there are cases in which a government will need to acquire land for a public purpose. However, the Committee heard throughout this Inquiry that the extent to which governments can restrict or interfere with property use and rights, without consultation or compensation, is increasing. Louise Staley wrote for the Institute of Public Affairs in 2006:

The old adage that “your home is your castle” is no longer true for many Western Australians. As community attitudes to heritage conservation and environmental management have changed, Government has imposed more and more controls on what can be done with privately owned property in many cases without consultation with or compensation for long-term owners.<sup>29</sup>

- 2.16 Submitters to this Inquiry agreed:

Farmers are increasingly uncertain about their future and their rights as landholders. Successive governments have done little to allay concerns or clear the way. Property rights of farmers must be respected in relation to government decisions affecting land and water entitlements to give them confidence to invest and run a farm business.<sup>30</sup>

My greatest concern about the erosion of respect for property rights over recent decades relates to the protection of natural values on private land where the private landowner arguably obtains no meaningful [or] measurable financial or other benefit from the government-ordained protective measures and instead the overwhelming majority of benefits accrue to the public.<sup>31</sup>

- 2.17 A sense of increasing erosion may be damaging to public confidence in private property rights:

at the moment our Torrens title is not worth the paper it is written on. It means nothing.<sup>32</sup>

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<sup>28</sup> Hon Rick Mazza MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 June 2019, p 4008.

<sup>29</sup> Institute of Public Affairs, *Property rights in Western Australia – time for a changed direction*, report prepared by Louise Staley, Melbourne, July 2006, p 2.

<sup>30</sup> Submission 6 from WAFarmers, 18 July 2019, p 2.

<sup>31</sup> Submission 29 from Bernie Masters, 29 July 2019, p 1.

<sup>32</sup> Peter Swift, private citizen, transcript of evidence, 21 October 2019, p 20.

2.18 The Pastoralists and Graziers Association of Western Australia submit that despite the fundamental importance of property rights to our society, they are misunderstood and poorly defined. They use the analogy of a 'bundle of sticks' to describe the 'bundle of rights':

The 20th Century saw a massive increase in government intervention in society and markets whereby government legislation, regulations and policies significantly altered the nature of property rights as previously understood by the owners of economic goods.

Almost invariably, the legislative and regulatory changes have resulted in a transfer of 'sticks' from the private to government realm. From a PGA perspective, this transfer represents an erosion of the property rights held by individuals and businesses.

In Western Australia, significant erosion of private property rights has been effected through the development and implementation of planning and environmental legislation/regulations that have either destroyed private property rights or transferred them to government ownership.<sup>33</sup>

2.19 Two particular issues are the focus of this Inquiry, as per the terms of reference:

- the inadequate disclosure of government interests and encumbrances that affect property
- the inability to access fair and reasonable compensation where a government interference affects property.<sup>34</sup>

2.20 Regarding both of these issues, Lecturer in Law at Murdoch University, Lorraine Finlay, submitted that the main concern is the need to strike an appropriate balance between individual and public interests:

Private property rights are not absolute. It is well recognised that the government has the right to pass laws that impact on private property rights in order to achieve a wider public benefit.

However, given the importance of private property rights, the government should be acting only when there is a clear and compelling public interest, should be imposing only the smallest necessary burden, and should be prepared to bear the cost of doing so.<sup>35</sup>

2.21 Ms Finlay pointed out that the underlying principles of private property rights protection tend to find easy agreement in abstract terms. What is more difficult is taking the steps to protect these rights in practice:

The problem is finding the political will to actually fix the problems that have already been identified, and to translate good intentions into practical outcomes.<sup>36</sup>

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<sup>33</sup> Submission 61 from Pastoralists and Graziers Association of Western Australia, 31 July 2020, p 3.

<sup>34</sup> The exception to this are some submitters who access common goods, particularly fish and water, who are happy to forgo fair and reasonable compensation when the government interference is in the interests of sustainability.

<sup>35</sup> Submission 47 from Lorraine Finlay, 31 July 2019, p 2.

<sup>36</sup> *ibid.*, p 1.



## CHAPTER 3

# Encumbrances that affect land

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### Introduction

- 3.1 Inquiry term of reference (b) requires the Committee to inquire into:
- The threat to the probity of the Torrens title system, which guarantees disclosure, and re-establishes the necessity for registration of all encumbrances that affect land including environmentally sensitive areas, bushfire-prone areas and implied easements for Western Power that currently sit behind the certificate of title.
- 3.2 A property interest gives rights to a landowner, but may also impose restrictions or responsibilities that may impact their use or enjoyment of the land.<sup>37</sup> There are a number of ways that the WA Government can, and does, impact upon the use and enjoyment of land. While enacted for the public good, such measures can have adverse effects on individual landowners.
- 3.3 The following government-imposed interests or encumbrances were raised in debate in the Legislative Council and submissions, and are therefore relevant to this Inquiry:
- land acquisition
  - Environmentally Sensitive Areas
  - planning reservations
  - utility easements (power and water)
  - Bush Fire Prone Areas.
- 3.4 The Committee emphasises that the above is not an exhaustive list.
- 3.5 This Chapter will outline the nature of the interests or encumbrances listed above and the impact these have on property value and the ability of landowners to use and enjoy their property. Chapters 4 and 5 will then address the issues of disclosure and compensation in relation to these encumbrances.

### Land acquisition

- 3.6 Perhaps the oldest and best understood way that governments can interfere with property rights is by the compulsory acquisition of land. Compulsory acquisition is the power of a government to acquire private rights in land without the willing consent of its owner or occupier for a public purpose:

This power is often necessary for social and economic development and the protection of the natural environment. Land must be provided for investments such as roads, railways, harbours and airports; for hospitals and schools; for electricity, water and sewage facilities; and for the protection against flooding and the protection of water courses and environmentally fragile areas.<sup>38</sup>

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<sup>37</sup> Submission 69 from Landgate, 31 July 2019, p 8.

<sup>38</sup> Food and Agriculture Organisation of the United Nations, *Compulsory acquisition of land and compensation*, Rome, 2008, p 63.

- 3.7 Compulsory acquisition is variously known in other jurisdictions as compulsory taking, resumption or expropriation. The power comes from 'eminent domain', the right of the government to acquire land for public utility works without the consent of its owner.<sup>39</sup>
- The power of a government to take the land of a citizen without consent is an inherent power that comes into existence with the establishment of the government...this power does not require recognition by constitutional provision or statute, but exists in absolute and unlimited form.<sup>40</sup>
- 3.8 The *Land Administration Act 1997* (LA Act) is the primary WA statute governing dealings in Crown land, and enables the Minister for Lands to sell Crown land in fee simple. It is also the primary statute providing for compulsory and voluntary land acquisition by the WA Government and other authorised bodies where land is required for public works.
- 3.9 Part 9 of the LA Act provides for the compulsory acquisition of interests in land for public purposes. Where authorised by law, interests in land held by a person other than the Crown may be taken. A number of agencies and organisations can compulsorily acquire land for public purposes, including:
- the WA Planning Commission
  - the Department of Planning, Lands and Heritage
  - Western Power
  - Main Roads WA
  - the Water Corporation
  - local governments.
- 3.10 Agencies may try to pursue voluntary avenues where possible. For example, the Water Corporation prefers to acquire land by agreement:
- Although the *Water Services Act (2012)* permits us to acquire land, we always prefer to reach an amicable agreement with landowners. If negotiation and mediation fails, compulsory purchase of the land or easement is by way of a 'taking order.'<sup>41</sup>
- 3.11 Compulsory acquisition has the potential to affect the use and enjoyment of property by depriving a private individual of that property. However, complaints about compulsory acquisition under the LA Act did not emerge as a major focus in submissions to this Inquiry.

## Environmentally Sensitive Areas

### Background

- 3.12 Environmental protection is widely considered to be in the public interest.<sup>42</sup> However, the Committee heard that the cost and impact of environmental protection is often

<sup>39</sup> Macquarie dictionary, See: [https://www.macquariedictionary.com.au/features/word/search/?search\\_word\\_type=Dictionary&word=eminent+domain](https://www.macquariedictionary.com.au/features/word/search/?search_word_type=Dictionary&word=eminent+domain). Viewed 16 April 2020.

<sup>40</sup> Julius Sackman et al, *Nichols on eminent domain*, Matthew Bender and Company Inc., 1997.

<sup>41</sup> Water Corporation, *Acquiring land for essential service works*, Perth, p 2.

<sup>42</sup> For example, see Glen McLeod, 'The Tasmanian Dam case and setting aside private land for environmental protection: who should bear the cost?', *The Western Australian Jurist*, 2015, vol. 6, p 127; Lucretia Dogaru, 'The importance of environmental protection and sustainable development', *Procedia – Social and Behavioural Science*, 2013., vol. 93(21), pp 1344-8 and United Nations Environment Programme, *Environmental rule of law – first global report*, January 2019, Nairobi, p 8.

disproportionately borne by individual landowners rather than the community. Submitters offered Environmentally Sensitive Areas (ESAs) and their associated regulation as an example.

- 3.13 In 2003, the *Environmental Protection Act 1986* (EP Act) was amended to include new provisions to protect native vegetation and control clearing. Under these provisions, the Minister for Environment may declare an area to be an ESA. The provisions also establish that it is an offence to clear native vegetation unless with a legislative exemption or permit.<sup>43</sup> The offence of land clearing will attract penalties of up to \$250 000 for individuals, \$500 000 for companies, and a daily penalty for each day clearing continues after notice has been given.
- 3.14 Section 51C provides that a person who clears native vegetation commits an offence, unless the clearing is:
- done in accordance with a clearing permit
  - of a kind set out in Schedule 6
  - of a kind prescribed for the purposes of this section and is not done in an ESA.
- 3.15 The only grazing allowed for in Schedule 6 is grazing on pastoral lease land. In practice, this means that landowners who wish to conduct clearing activities on an ESA which is not subject to authorisation under a written law must obtain a permit from the Department of Water and Environmental Regulation (DWER).
- 3.16 In 2005, the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* (Notice) was gazetted, effectively declaring an ESA on 98 000 parcels of land across WA.<sup>44</sup> The Notice is attached at Appendix 6. Areas declared to be ESAs under the Notice include:
- a declared World Heritage property as defined in the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth)
  - an area included on the Register of the National Estate under the *Australian Heritage Council Act 2003* (Cth)
  - defined wetlands (including wetlands listed under the Ramsar Convention, nationally important wetlands as defined by the Commonwealth Government, and others) and the area within 50 metres of the wetland
  - certain areas covered by vegetation within 50 metres of rare flora
  - the area covered by a threatened ecological community
  - certain Bush Forever sites
  - certain areas covered by the following Environmental Protection Policies:
    - Environmental Protection (Gnangara Mound Crown Land) Policy 1992
    - Environmental Protection (Western Swamp Tortoise) Policy 2002
    - Environmental Protection (Swan Coastal Plain Lakes) Policy 1992
    - Environmental Protection (South West Agricultural Zone Wetlands) Policy 1998
    - Environmental Protection (Swan and Canning Rivers) Policy 1998.<sup>45</sup>
- 3.17 ESAs are only relevant in the context of native vegetation, meaning the clearing provisions only apply if native vegetation is also present on the property:

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<sup>43</sup> *Environmental Protection Amendment Act 2003*, s 51C.

<sup>44</sup> Sarah McEvoy, Executive Director, Strategic Policy, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 8.

<sup>45</sup> *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, s 4.

there are about 98 000 properties that have an ESA layer that sits across them. That does not necessarily mean that those properties actually have native vegetation and therefore that the ESA would apply, because there might not be native vegetation that needs to be cleared and an exemption sought.<sup>46</sup>

3.18 With reference to the Notice and the EP Act, and in consultation with DWER, it is up to landowners to ascertain if their property is declared an ESA and if the clearing provisions apply due to the presence of native vegetation.

3.19 Hon Helen Morton, former Minister for Mental Health representing the Minister for Environment, said that areas were prescribed as ESA to ensure an extra level of consideration is afforded:

The intent of listing areas or classes as ESAs is to ensure that clearing that is allowed by exemption under regulations cannot be undertaken without consideration through a permit application and therefore potentially degrade areas of special environmental sensitivity or value.<sup>47</sup>

3.20 ESAs are intended to prevent incremental degradation of rare flora, threatened ecological communities and high value wetlands. On how ESAs are identified, DWERs 'a guide to grazing of native vegetation' states:

ESAs primarily adopt areas established under other 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), or based on Government endorsed policies and documents such as Bush Forever.<sup>48</sup>

3.21 The Notice replaced the ESAs defined in Regulation 6 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (Clearing Regulations). The then-Department of Environment did not consider any provisions of the Notice to be controversial:

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.<sup>49</sup>

3.22 The Committee notes that while no new ESAs were defined by the Notice, landowners were not notified that their land was impacted at this point.

### **Impact on farmers and graziers**

3.23 Pastoralists and graziers in the agricultural regions of WA have been especially impacted by the ESA regime. All wetlands in the agricultural regions of WA have been declared ESAs, and therefore many pastoralists and graziers have defined wetlands on their properties.<sup>50</sup> This raises serious questions for landowners about the ability to carry on with their enterprises, which often include grazing.

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<sup>46</sup> Kelly Faulkner, Executive Director, Regulatory Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 3.

<sup>47</sup> Hon Helen Morton MLC, Minister for Mental Health, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 13 October 2015, p 7061.

<sup>48</sup> Department of Water and Environmental Regulation, *A guide to grazing of native vegetation*, September 2015, p 2.

<sup>49</sup> Environmental Protection (Environmentally Sensitive Areas) Notice 2005, *Explanatory Memorandum*, Legislative Council, p 1.

<sup>50</sup> Lorraine Finlay, 'Environmentally Sensitive Areas in Western Australia: highlighting the limits of the 'just terms' guarantee', *University of Western Australia Law Review*, 2016, vol. 41, 1, p 60.

3.24 DWER claim that practically, this may not be the case:

From our perspective, a refusal of a clearing permit application typically prevents future clearing and associated land uses for that area that has been refused, but it does not require the landowner to cease undertaking activities in areas which have already been lawfully cleared.

So, in agricultural areas, people will still continue to do what they have always done in relation to those extensively cleared areas, for example, even if the area they were seeking to clear was not approved for that purpose.<sup>51</sup>

### FINDING 3

Environmentally Sensitive Areas under the *Environmental Protection Act 1986* particularly impact, or are perceived to impact, pastoralists and graziers in the agricultural regions of Western Australia.

3.25 The Committee heard from a number of landowners who feel passionately about the impact the Notice has had on their lives, livelihood and property rights. Affected landowners were not individually advised when the Notice came into effect, and many are concerned about the seemingly arbitrary inclusion of all wetlands:

It is PGA's view, and that of many of our members who have been directly impacted, that ESAs were implemented hastily, without appropriate stakeholder consultation, with questionable technical justification for the inclusion of extensive areas of "ephemeral wetlands" that exist only in winter, certainly without any PRA and were not communicated to effected landholders by the WA Government.<sup>52</sup>

3.26 Some feel there is inequity in the way ESAs have been designated:

One has difficulty in understanding why the wetlands in the Gingin Shire have much more apparent significant value than those in other areas, such as the Peel - Mandurah area, Dandaragan Shire and the Metropolitan area where developers seem to have no problem filling wetlands/damplands for residential and commercial purposes.<sup>53</sup>

3.27 The Committee heard that it is difficult for prospective purchasers to identify whether the land they are interested in purchasing is an ESA.<sup>54</sup> ESAs are not listed on Certificates of Title, and can be difficult to identify on Landgate's Property Interest Reports (discussed in more detail in Chapter 4). While members of the public can search online maps, the Committee heard that this is not a straightforward process:

Even now, I have clever young people in my office, who practise in the area and so on, and they find it hard to access the systems that tell you where the ESAs are. If they find it hard, there is no hope for someone like me, or anyone, I think, of a certain generation, unless they are right up with it. For some reason it is really hard to find out where ESAs are.<sup>55</sup>

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<sup>51</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 8.

<sup>52</sup> Submission 61 from Pastoralists and Graziers Association of Western Australia, 31 July 2019, p 5.

<sup>53</sup> Submission 12 from Kay and Bryon Micke, 24 July 2019, p 4.

<sup>54</sup> Submission 6 from WAFarmers, 18 July 2019, p 8.

<sup>55</sup> Glen McLeod, Principal, Glen McLeod Legal, transcript of evidence, 18 November 2019, p 8.

## FINDING 4

Members of the public may find it difficult to identify whether their land, or part thereof, has been declared an Environmentally Sensitive Area.

- 3.28 A number of submissions suggested that compensation should be available for landowners who have been adversely affected by an ESA on their land.<sup>56</sup> This proposition will be discussed further in Chapter 5.
- 3.29 By restricting clearing, ESA regulations have the potential to restrict economic activity on private property:
- Farm and business competitiveness, productivity and jobs are lost. The environmental legislation acts as a Government imposed quota, tariff, or tax on private farming landowners.<sup>57</sup>
- 3.30 However, the Committee notes that the presence of an ESA does not necessarily preclude clearing from taking place. The Hon Helen Morton said in 2015:
- Since the regulations took effect, more than 900 clearing permits have been granted within ESAs.<sup>58</sup>
- 3.31 Prosecution for clearing on an ESA appears to be rare. DWER told the Committee that while there have been 8 prosecutions pursuant to section 51C of the EP Act since 2015, none of these prosecutions were within ESAs.<sup>59</sup> As at 27 February 2020, there are currently 78 reports of alleged unauthorised native vegetation clearing under investigation.<sup>60</sup> Not all of those cases will be within an ESA.
- 3.32 While prosecution may currently be rare, the Committee notes that this could change in the future if subsequent governments decide to pursue a more aggressive approach.

### Case study—Peter Swift

- 3.33 Peter Swift bought his 485-hectare property near Frankland River in 2007. He intended to 'run a few cattle and sheep' on the property after retiring from his work in the north of WA.<sup>61</sup>
- 3.34 Mr Swift had been away up north working and maintains he had not cleared the property.<sup>62</sup> He sought to explain this at a meeting with then-Department of Environment and Conservation officers. According to Mr Swift, they would not hear him out. They maintained he had illegally cleared his property and would be prosecuted. Mr Swift left the meeting asking for a senior officer to contact him.<sup>63</sup>
- 3.35 Thirteen months later, Mr Swift was charged that between 22 November 2007 and 13 December 2009 at Lot 1, Diagram 67189 Bunnings Log Road, Frankland River, he caused or

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<sup>56</sup> For example, Submission 12 from Kay and Bryon Micke, 24 July 2019, Submission 48 from Peter Swift, 31 July 2019, and Submission 47 from Lorraine Finlay, 31 July 2019.

<sup>57</sup> Submission 35B from Steve Chamarette, 30 July 2019, p 1.

<sup>58</sup> Hon Helen Morton MLC, Minister for Mental Health, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 13 October 2015, p 7061.

<sup>59</sup> Mike Rowe, Department of Water and Environmental Regulation, Answer to question on notice B4 asked at hearing held 17 February 2020, dated 4 March 2020, p 4.

<sup>60</sup> Mike Rowe, Department of Water and Environmental Regulation, Answer to question on notice B6 asked at hearing held 17 February 2020, dated 4 March 2020, p 6.

<sup>61</sup> The Committee refers readers to paragraph 5.130–5.149, which discuss costs and compensation regarding Environmentally Sensitive Areas.

<sup>62</sup> Peter Swift, private citizen, transcript of evidence, 21 October 2019, p 17.

<sup>63</sup> *ibid.*, pp 17-8.

allowed clearing of native vegetation to occur without authorisation, contrary to section 51C and 99Q of the EP Act.<sup>64</sup>

- 3.36 The matter was heard in the Manjimup Magistrate's Court and evidence was taken in March 2013 over 3 days, with the defence calling expert evidence. The then-Department of Environment and Conservation relied on an aerial image which they say was taken about 22-29 November 2007,<sup>65</sup> and a satellite image taken on 13 December 2009.<sup>66</sup> In addition, both the prosecution and the defence tendered photos. Questions were raised about the reliability of comparing an aerial image with a satellite image and the interpretation of those images.<sup>67</sup> In addition, questions were raised about inconsistencies between the images and the photos.<sup>68</sup>
- 3.37 The previous owner gave evidence that he had a clearing permit and admitted to clearing the property during the time he owned the property.<sup>69</sup> There was disagreement between expert witnesses as to when the clearing was likely to have occurred. The Magistrate heard from the defence expert and other defence witnesses that clearing occurred around 30 years earlier, and in the early 1990s.<sup>70</sup> The WA Government expert maintained the clearing occurred within 5 to 10 years prior.<sup>71</sup>
- 3.38 The Forest Products Commission (FPC) had a pine plantation, under contract, on the property at the time.<sup>72</sup> They had constructed a drain on the property to manage salinity and Mr Swift testified to maintaining weeds in and along the drain using a Pederick rake.<sup>73</sup>
- 3.39 By the end of the trial, the WA Government's case amounted to arguing that if the Court was to accept, based on the evidence of the accused, that he maintained the drain in the cleared area with a Pederick rake, and this occurred within the relevant period this would amount to clearing for the purposes of the EP Act and the case would be proven.<sup>74</sup>
- 3.40 In relation to this, Magistrate Hamilton stated in her decision:

the State's case against the Accused was never put on the basis that his maintaining the drain amounted to the clearing alleged. Even if I did find that this occurred within the relevant period, which I do not, to say that maintaining a drain constructed by one government department, or under instructions from that department, in relation to the growing of trees under a contract with the same or another government department amounts to an offence under legislation administered by another government department is to create a farcical situation whose proportions could only be envisaged by Sir Humphrey Appleby.<sup>75</sup>

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<sup>64</sup> Tracy Littlefair, Acting Regional Manager, Magistrates Court and Tribunals, Department of Justice, email, 18 September 2020, Attachment 1, p 2.

<sup>65</sup> Department of Water and Environmental Regulation, Answer to question on notice 7 asked at hearing held 19 August 2020, dated 28 August 2020, p 1.

<sup>66</sup> Tracy Littlefair, Acting Regional Manager, Magistrates Court and Tribunals, Department of Justice, email, 18 September 2020, Attachment 1, p 30.

<sup>67</sup> *ibid.*, p 25.

<sup>68</sup> *ibid.*, p 29.

<sup>69</sup> *ibid.*, pp 3-4.

<sup>70</sup> *ibid.*, pp 5 and 22.

<sup>71</sup> *ibid.*, p 24.

<sup>72</sup> *ibid.*, p 16.

<sup>73</sup> *ibid.*

<sup>74</sup> *ibid.*, p 27.

<sup>75</sup> *ibid.*

- 3.41 Mr Swift told the Committee that he endured three long years of emotional stress, anxiety, huge legal bills and loss of income.
- 3.42 Mr Swift told the Committee that he had no knowledge that 200 hectares of his property was an ESA. The original sale of the property was settled through a solicitor, and the presence of an ESA on the land was not detected at that point.<sup>76</sup> Mr Swift explained that if he had known about the ESA, he would not have purchased the property.<sup>77</sup>
- 3.43 Following the court case, Mr Swift met with the then-Department of Environment and Conservation to ascertain which activities he could carry out on the property:
- I said, "What can I and can I not do?" "You need a permit to graze your stock. You are not allowed to do this; you are not allowed to do that." I said, "Well, I didn't buy a national park, I bought a rural farmland."<sup>78</sup>
- 3.44 Mr Swift would need to apply for a permit to clear native vegetation to use the property for grazing. The cost of a clearing permit varies depending on the size of the clearing. If Mr Swift applied for a clearing permit for the whole of his property or that part of his property not covered by the ESA, on current fees, the fee is about \$2 000 if it is determined to be 'extensive land use zone'.<sup>79</sup> A clearing permit is valid for two years. If it was determined that a clearing permit was needed, Mr Swift would need to apply for a clearing permit every two years for as long as he intended to graze livestock, and the fee would apply to each application.
- 3.45 Mr Swift met with the then-Minister for Environment and then-Attorney General to explain his ordeal and seek recompense for his financial losses,<sup>80</sup> and lost work time.<sup>81</sup> Mr Swift explained that the ordeal:
- has destroyed my life.<sup>82</sup>
- 3.46 It was suggested that Mr Swift apply for an ex-gratia payment. He told the Committee that he did so, however, it was refused.<sup>83</sup>
- 3.47 Mr Swift told the Committee about the impact of the ESA:
- The application of the ESA has adversely affected my property value and following the court case and subsequent effect of having an ESA on my property, I suffered a mental breakdown and continuing mental health issues. This resulted in me not being able to continue working up North or pursuing other employment.<sup>84</sup>

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<sup>76</sup> Peter Swift, private citizen, transcript of evidence, 21 October 2019, p 21.

<sup>77</sup> *ibid.*, p 22.

<sup>78</sup> *ibid.*, p 18.

<sup>79</sup> Department of Water and Environmental Regulation. See: <https://www.der.wa.gov.au/our-work/clearing-permits/fees/faqs>. Viewed 23 September 2020.

<sup>80</sup> Peter Swift, private citizen, transcript of evidence, 21 October 2019, p 18.

<sup>81</sup> Submission 48 from Peter Swift, 31 July 2019, p 1.

<sup>82</sup> Peter Swift, private citizen, transcript of evidence, 21 October 2019, p 18.

<sup>83</sup> *ibid.*

<sup>84</sup> Submission 48 from Peter Swift, 31 July 2019, p 1.



- 3.48 Affected landowners are able to apply for a clearing permit:
- A permit can be granted, but they only apply for between two and five years, can be revoked at any time and an ESA is not static and changes according to rainfall, so cannot be effectively fenced.<sup>85</sup>
- 3.49 Mr Swift expressed the view that ESAs were developed with the intent to take freehold land from people and not pay for it. As for the Torrens title system, Mr Swift said:
- it's not worth the paper it's written on ... we have lost all our rights...<sup>86</sup>
- 3.50 In 2019, Mr Swift told the Committee that although he had placed the property on the market, it had not sold.<sup>87</sup> In addition, the bank commenced legal proceedings to recover the debt owed, being the mortgage.<sup>88</sup> An offer to purchase the property by the FPC at 'nearly \$400 000 less than it was marketed for' was opposed by the local shire on the grounds that the FPC wanted to continue to use the property for plantation timber, and the shire did not want farmland being lost to plantations.<sup>89</sup> The FPC took the matter to the State Administrative Tribunal. At the time of the hearing in October 2019, the matter was still being negotiated.<sup>90</sup>
- 3.51 Mr Swift's requests for meetings with Ministers of the current WA Government have been declined.<sup>91</sup> He said:
- They send you back to the Department of Environment Regulation, which cannot answer the questions. That is why I wrote to the minister, because they [the Department] cannot answer my questions.<sup>92</sup>
- 3.52 Recently the Committee was informed by Mr Swift that an agreement had been reached, with the FPC, with Mr Swift's bank agreeing to accept this as payment in full of the mortgage.<sup>93</sup> Mr Swift maintains that both he and his financial institution suffered a monetary loss.<sup>94</sup>
- 3.53 Mr Swift continues to suffer mental health problems and has been unable to work.<sup>95</sup>

### **Case study—Kay and Bryon Micke**

- 3.54 Kay and Bryon Micke own a 545-hectare property near Gingin, where they have operated a sheep grazing enterprise for 40 years. Grazing stock have been present on the property since approximately 1904.<sup>96</sup>
- 3.55 The Micke's first became aware of ESAs in 2012, when a neighbour was investigated for illegal clearing. After searching the maps available through the DWER website, they found that 'around 50 percent of the property' was declared as an ESA.

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<sup>85</sup> *ibid.*

<sup>86</sup> Peter Swift, private citizen, transcript of evidence, 21 October 2019, p 20.

<sup>87</sup> *ibid.*, p 18.

<sup>88</sup> *ibid.*, p 21.

<sup>89</sup> *ibid.*, p 19.

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid.*, p 20.

<sup>92</sup> *ibid.*

<sup>93</sup> *ibid.*, p 21.

<sup>94</sup> Peter Swift, private citizen, email, 15 May 2020.

<sup>95</sup> Submission 48 from Peter Swift, 31 July 2019, p 1.

<sup>96</sup> Submission 12 from Kay and Bryon Micke, 24 July 2019, p 3.

3.56 Mr and Mrs Micke believe that because most of their productive land area has been 'locked up' by ESA regulations, their property value has decreased by approximately \$2.5 million. They contend that they, along with other farmers in the area, have suffered significant stress as a result:

Farmers are an introverted group and are even more so under the threat of current legislation. They are very reluctant to 'go public' as they feel that if they are identified, they will attract undue attention from authorities.

There is a feeling amongst farmers that if they 'lie low', the problem will go away and resolve itself. Instead, the uncertainty eats away at the core of the people affected (including us), relationships suffer and normal business activities such as farm succession planning and borrowing ability are challenged to the point of being stalled.<sup>97</sup>

3.57 As well as causing concern, the ESA has caused confusion. It is unclear to them precisely how the wetlands on the property were defined. Mr Micke has had difficulty getting advice from various environment agencies. Mrs Micke refers to the situation as 'a mix-up all the way through, with various layer upon layer of legislation'.<sup>98</sup>

3.58 The Micke's have interpreted the EP Act to mean that grazing livestock on their property is illegal,<sup>99</sup> although it seems possible to the Committee that DWER could advise otherwise, as per the Guidelines. The Micke's have chosen not to apply for a permit:

It is bureaucracy; how much respect are we going to have to deliver bureaucracy like this?<sup>100</sup>

3.59 The Committee notes that the 2-5 year default clearing permit term, costing potentially thousands of dollars each time, may play a role in decisions to avoid the process. The cost and time limit associated with clearing permits could make it difficult for people to run their businesses and plan for the future.

3.60 Like Peter Swift, they would prefer to sell the land. They attempted to sell the land to the WA Government for conservation, but were unsuccessful.<sup>101</sup> The Western Australian Planning Commission (WAPC) advised that it is approached by landowners 'a few times a year' to purchase land that, while not reserved, has conservation value. The WAPC has purchased some such properties, which are primarily used to offset the environmental effects on public works.<sup>102</sup>

3.61 The Committee considers that the main issue in this case is not the threat of prosecution, but the stress and uncertainty that comes with knowing land is not completely your own—particularly when the owners have found the process and legislation difficult to navigate. In addition, time limits associated with clearing permits and the loss of resale value of property are also issues.

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<sup>97</sup> *ibid.*, p 4.

<sup>98</sup> Kay Micke, private citizen, transcript of evidence, 21 October 2019, p 15.

<sup>99</sup> Submission 12 from Kay and Bryon Micke, 24 July 2019, p 11.

<sup>100</sup> Bryon Micke, private citizen, transcript of evidence, 21 October 2019, p 15.

<sup>101</sup> Kay Micke, private citizen, transcript of evidence, 21 October 2019, p 13.

<sup>102</sup> Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 13 May 2020, p 5.

## Petition to repeal

- 3.62 Concerns around the ESA regime are not new. On 17 June 2014, the Hon Mark Lewis tabled a petition in the Legislative Council seeking to repeal the Notice (Petition).<sup>103</sup> The Petition was referred to the Standing Committee on Environment and Public Affairs (Environment Committee).
- 3.63 The Petition requested that the Legislative Council recommend the repeal of the Notice, submitting that:<sup>104</sup>
- the Notice was invalid, as the WA Government had failed to fulfil legislative consultation requirements
  - owners of land with an ESA were unaware of the impacts of the Notice on their properties, as there was no consultation
  - owners of land with an ESA were at risk of criminal prosecution for clearing native vegetation
  - if the Notice was 'fully implemented' it would destroy the livelihoods of thousands of property owners.
- 3.64 The Environment Committee tabled its report on the Petition in August 2015. The Committee recommends that interested readers refer to that report for more detail.
- 3.65 The Environment Committee made 13 findings, including that:
- consultation on the Notice was so limited as to be pointless
  - the seemingly all-encompassing and untested inclusion of wetlands in the Notice is cause for concern
  - there is limited information available to the public on ESAs
  - landowners were not adequately advised that a law restricting their land use had been introduced
  - 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
  - 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.
- 3.66 While the Environment Committee did not recommend the repeal of the Notice, it made 9 recommendations, including that:
- the Notice and the scope of land declared an ESA be reviewed, with a particular focus on wetland areas
  - each affected landowner be written to, advising of the existence of the ESA and its impact
  - section 51C of the EP Act be redrafted to state in positive language the circumstances in which a person is authorised to clear native vegetation.

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<sup>103</sup> Tabled Paper 1518, Legislative Council, 17 June 2014.

<sup>104</sup> Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 41, *Petition no. 42 – request to repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, August 2015, p 15.

## Implementation status

- 3.67 In September 2019, the Committee wrote to the Minister for Environment seeking the implementation status of the recommendations. Each recommendation is included in a table at Appendix 3 with the corresponding original Government response and status update.
- 3.68 To date, the current and previous Governments have implemented four of the Environment Committee's nine recommendations. For example, in 2015 DWER developed 'A guide to grazing of native vegetation' (Guide). As recommended, DWER consulted publicly and with stakeholder groups including the Pastoralists and Graziers Association of Western Australia and the Gingin Property Rights Group.<sup>105</sup>
- 3.69 DWER has also removed the expired regulation 6 from the Clearing Regulations and provided a clearer link on its website for the public to view information regarding ESAs.
- 3.70 The Minister for Environment told the Committee that some of the Environment Committee's 2015 recommendations will be addressed through upcoming reforms to the EP Act.<sup>106</sup> In October 2019, a discussion paper entitled 'Modernising the Environmental Protection Act' and an exposure draft bill were published for public comment:<sup>107</sup>

The principal criticism that has been levelled at the clearing provisions is their complexity, and that they are focused on process rather than outcomes. This view is at the heart of many stakeholder submissions made during previous reviews.

The Bill simplifies and improves the provisions for clearing of native vegetation by focusing on environmental outcomes rather than administrative processes.<sup>108</sup>

- 3.71 The Environmental Protection Amendment Bill 2020 (EP Bill) was introduced in the Legislative Assembly in April 2020. The Committee notes that at least two of the outstanding recommendations of the Environment Committee will not be addressed by the EP Bill—what constitutes 'clearing', and disclosure (see 'outstanding issues' at 3.83).

### *Review of the scope of land declared ESA*

- 3.72 An ongoing issue is the scope of land declared ESA under the Notice. In 2015, the Environment Committee found that while areas of special environmental sensitivity or value should be afforded extra protection, the all-encompassing and seemingly untested inclusion of wetlands in the Notice was a cause for concern:

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.<sup>109</sup>

- 3.73 Submitters have reiterated this concern in the course of the current Inquiry:<sup>110</sup>

For while it may be appropriate to impose environmental restrictions on areas of high conservation value, it is difficult to seriously support the claim that each and every one of the 98,042 parcels of land in Western Australia that includes an ESA

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<sup>105</sup> Hon Albert Jacob MLA, Minister for Environment and Heritage, letter, 6 October 2015, p 4.

<sup>106</sup> Hon Stephen Dawson MLC, Minister for Environment, letter, 15 October 2019, p 5.

<sup>107</sup> *ibid.*, p 3.

<sup>108</sup> Department of Water and Environmental Regulation, *Modernising the Environmental Protection Act – discussion paper*, Government of Western Australia, October 2019, p 17.

<sup>109</sup> *ibid.*

<sup>110</sup> Submission 12 from Kay and Bryon Micke, 24 July 2019.

designation contains areas deserving of the highest possible levels of environmental protection.<sup>111</sup>

- 3.74 The Environment Committee recommended that the Minister for Environment review the scope of land declared an ESA, with a focus on wetland ESAs.<sup>112</sup>
- 3.75 A complicating factor is that a range of State and Commonwealth agencies are responsible for the various instruments used to declare ESAs under the Notice, including the Commonwealth Department of Agriculture, Water and Environment and the WA Environmental Protection Authority (EPA). DWER told the Committee that those agencies are responsible for reviewing their own instruments.<sup>113</sup>
- 3.76 The EPA advise that four of the five Environmental Protection Policies currently listed in the Notice as declaring areas to be ESA have been repealed:
- Of the five environmental protection policies listed in the notice, only the Western swamp tortoise environmental protection policy remains in force. The review of that environmental protection has been deferred until the science informing the review of the swamp tortoise recovery plan is made available. We anticipate the review of that environmental protection policy to be completed by 30 November 2022.<sup>114</sup>
- 3.77 The repealed Environmental Protection Policies include the:
- Environmental Protection (Gnangara Mound Crown Land) Policy 1992
  - Environmental Protection (Swan Coastal Plain Lakes) Policy 1992
  - Environmental Protection (South West Agricultural Zone Wetlands) Policy 1998
  - Environmental Protection (Swan and Canning Rivers) Policy 1998.<sup>115</sup>
- 3.78 Although these four Environmental Protection Policies have been repealed, they are still listed in the Notice. The Committee considers that this is misleading to members of the public who may refer to the Notice to determine if their land is an ESA.

## FINDING 5

Due to the repeal of four Environmental Protection Policies, the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* may contain expired information, which is misleading for members of the public.

- 3.79 Principles of the rule of law require that the law must be certain and clear, particularly when it prescribes offences and penalties.<sup>116</sup> The Committee agrees that subsidiary legislation, such as the Notice, should be current and correct.

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<sup>111</sup> Submission 47 from Lorraine Finlay, 31 July 2019, p 7.

<sup>112</sup> Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 41, *Petition no. 42 – request to repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, August 2015, p iii.

<sup>113</sup> Mike Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 2.

<sup>114</sup> Dr Tom Hatton, Chairman, Environmental Protection Authority, transcript of evidence, 20 May 2020, p 2.

<sup>115</sup> *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, s 4.

<sup>116</sup> Law Council of Australia, *Policy statement – rule of law principles*, Canberra, March 2011, p 2.

3.80 DWER advise that out of date information will be removed when ESA declarations are moved from the Notice to the Clearing Regulations, a change proposed by the EP Bill.<sup>117</sup> The Committee is not satisfied with this response, as there is no certainty as to whether the EP Bill will pass and when subsequent amendments to the Notice and Clearing Regulations will be enacted, if at all.

3.81 DWER does not intend to notify landowners in the areas subject to repealed policies that their land is no longer an ESA:

**The CHAIR:** ...I would have thought that communication of a change of status would have been an important role for the department to undertake with affected landowners.

**Ms FAULKNER:** The ESA layer cuts across the entire state. As I understand it—Sarah might be able to correct me—there are about 98 000 properties that have an ESA layer that sits across them...At this point, we do not contact each individual landowner where an ESA might apply or not apply. I should just add that we do have an interactive map that is available, so someone could identify whether their property has an ESA layer if they wanted to.<sup>118</sup>

3.82 The Committee notes that repeal of the Environmental Protection Policies will not necessarily mean all land in those areas is no longer an ESA—some may be otherwise covered by the Notice, for example, Ramsar wetlands. However, the Committee concluded that any landowners who are no longer impacted by the Notice should be advised by letter, and expired information should be removed from the Notice as soon as possible.

#### RECOMMENDATION 1

Where an Environmental Protection Policy has been repealed and land is not otherwise covered by the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, the Department of Water and Environmental Regulation write to relevant landowners, notifying that their land is no longer subject to an Environmentally Sensitive Area.

#### RECOMMENDATION 2

Following the prescription of Environmentally Sensitive Areas in the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*, the Department of Water and Environmental Regulation inform all landowners in writing that their land is an Environmentally Sensitive Area, and advise them of the potential implications if native vegetation is present.

#### RECOMMENDATION 3

The Minister for Environment ensure expired information resulting from the repeal of Environmental Protection Policies is removed from the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*.

<sup>117</sup> Sarah McEvoy, Executive Director, Strategic Policy, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 2.

<sup>118</sup> Kelly Faulkner, Executive Director Regulatory Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 3.

## RECOMMENDATION 4

The Premier introduce in the Parliament of Western Australia an omnibus bill amending all relevant Western Australian legislation to make it a statutory requirement for Western Australian Government departments and agencies, when making decisions or taking actions that impact on the use of a landowner's property, to notify each individual landowner impacted in writing before the decision is made or action taken, and advise how this will impact the landowners use of the land. Further, that impacted landowners be provided an opportunity to make submissions before the decision is made and/or action taken.

### Outstanding issues

- 3.83 Two issues raised in the 2015 Petition Report remain unresolved—clarity around what constitutes clearing under the EP Act, and disclosure.<sup>119</sup>

#### *What constitutes clearing*

- 3.84 There is some confusion in the community about the definition of 'clearing' under the EP Act.<sup>120</sup> This creates a problem, because the definition underpins an offence.
- 3.85 As outlined at 3.14, section 51C of the EP Act establishes the offence of unauthorised clearing native vegetation:

#### **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.

- 3.86 Under section 51A of the EP Act, clearing means:

(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 an 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 an area.

<sup>119</sup> Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 41, *Petition no. 42 – request to repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, August 2015.

<sup>120</sup> For example, see Submission 12 from Kay and Bryon Micke, 24 July 2019, p 3.

3.87 DWER developed the Guide to provide guidance on when grazing constitutes 'substantial damage' to native vegetation, and is therefore clearing under the EP Act.<sup>121</sup> The Guide indicates that DWER will apply the following guidance in determining whether or not the grazing of stock constitutes substantial damage and is therefore clearing:

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.

Grazing that involves the severing of stems or taking leaves or minor branches, but does not compromise the long term health of the native vegetation, is not considered to be clearing. The most visible indications of substantial damage caused by grazing to native vegetation include:

- death;
- ringbarking;
- excessive defoliation, root loss or uprooting.<sup>122</sup>

3.88 According to Lorraine Finlay, Lecturer in Constitutional Law at Murdoch University, there is a clear legislative presumption against any clearing under the EP Act, which the Guide does not reflect:<sup>123</sup>

it does not reflect the substantially broader definition that is expressly provided for on the face of the legislation. For example, the legislation expressly states that the grazing of stock that causes substantial damage to 'some or all of the native vegetation in an area' will be considered clearing. Any native vegetation that is consumed by grazing stock must [necessarily] have been substantially damaged – it has been eaten!<sup>124</sup>

3.89 The Committee considers that landowners could easily interpret the definition of clearing under section 51A in this way, assuming that grazing constitutes 'substantial damage', as the native vegetation is being consumed. For example, Kay and Bryon Micke interpreted clearing this way:

From our understanding of legislation pertaining to ESA, the clearing of vegetation by any means, including grazing by livestock, on ESA is not permitted. If we are correct in our understanding, our grazing enterprise is, since the designation of ESA, of doubtful legality and we are obliged by law to cease our current activities.

Since it is not permissible to clear, as defined by clause 51A of the Environmental Protection Act 1986, ESA land, the use of this farm for any business enterprise is severely limited thus significantly devaluing it as an agricultural land asset.<sup>125</sup>

3.90 As mentioned at paragraph 3.79, principles of the rule of law require that the law must be certain and clear, particularly when it prescribes offences and penalties.<sup>126</sup> Landowners should be able to understand what is required of them by referring to the legislation, rather

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<sup>121</sup> *ibid.*

<sup>122</sup> Department of Water and Environmental Regulation, *A guide to grazing of native vegetation*, Perth, September 2015, p 4.

<sup>123</sup> Lorraine Finlay, 'Environmentally Sensitive Areas in Western Australia: Highlighting the limits of the 'just terms' guarantee', *The University of Western Australia Law Review*, pp 54 and 57.

<sup>124</sup> *ibid.*, p 56.

<sup>125</sup> Submission 12 from Kay and Bryon Micke, 24 July 2019, p 3.

<sup>126</sup> Law Council of Australia, *Policy statement – rule of law principles*, Canberra, March 2011, p 2.



than a guidance document on the DWER website. The fact that a guidance document has been issued suggests a level of community confusion and misunderstanding.

## FINDING 6

The meaning of grazing is unclear under the *Environmental Protection Act 1986*.

3.91 DWER elaborated on the current situation:

**Ms McEVOY:** The definition of “clearing” includes a whole lot of things but also talks about substantial damage. That guideline was very much around defining what was meant by substantial damage. Clearing to the extent that it had happened in the past—so, not changing it, not intensifying it, not increasing the number of stock that were grazing or introducing them to different areas—was considered not to cause substantial damage.

**The ACTING CHAIR:** So you do not believe there is a need for legislative clarification?

**Ms McEVOY:** I guess that is a decision for government.<sup>127</sup>

3.92 The Committee notes that the EP Bill retains the current definition of clearing.

3.93 The Committee is of the view that it is unreasonable to expect members of the public to refer to a department-issued guidance document to ascertain whether grazing constitutes clearing, particularly when the Guide itself is not definitive. The Committee also notes that it is not DWERs role to define an offence for which a member of the community may be prosecuted. This is a role for Parliament.

## RECOMMENDATION 5

The Minister for Environment introduce a Bill in the Parliament of Western Australia to clarify the definition of clearing under section 51A of the *Environmental Protection Act 1986*, with a view to clarifying whether grazing livestock is permissible within an Environmentally Sensitive Area.

### Disclosure

3.94 A major and enduring criticism of the Notice is that individual landowners were never advised that they had an ESA on their land:

The combined effect of the lack of prior consultation, lack of individual notification, failure to record an ESA designation on a Certificate of Title, and non-user friendly search system is that many property owners are simply not aware that their property is affected, and it is unnecessarily difficult for them to find out. As a result, many current landowners may unknowingly be committing a criminal offence.<sup>128</sup>

3.95 In 2015, the Environment Committee recommended that the then-Department of Environmental Regulation write to each affected landowner to advise of the existence of the ESA and its impact. In 2019, the Minister for Environment advised that this recommendation is not supported.<sup>129</sup>

<sup>127</sup> Sarah McEvoy, Executive Director, Strategic Policy, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 10.

<sup>128</sup> Submission 6 from WAFarmers, 18 July 2019, p 8.

<sup>129</sup> Hon Stephen Dawson MLC, Minister for Environment, letter, 26 November 2019, p 5.

- 3.96 DWER confirmed that in 2020, it is possible that some Western Australians are still unaware that there is an ESA on their land.<sup>130</sup> If members of the public wish to locate an ESA, they can search the address through DWERs interactive online maps. The adequacy of this option is discussed in Chapter 4.
- 3.97 The Committee asked DWER if anyone currently under investigation for unauthorised clearing claimed to be unaware that their land was an ESA. DWER advised that they have not formally interviewed all landowners of matters under investigation, but of those who have been interviewed, none contended that they were unaware that their land has an ESA.<sup>131</sup>
- 3.98 The Committee is of the view that WA Government departments and agencies have a duty, albeit not a statutory duty, to inform landowners of any actions or proposed actions by government that may impact a landowner's use of their land. Further, that simply advertising the change/action, holding workshops or consulting stakeholder groups, while important and supported, should not be in substitution to writing to impacted landowners. The decision by the WA Government not to notify landowners of an ESA on their land, and not to act on the Environment Committee's 2015 recommendation to this effect, has resulted in:
- some landowners being unaware that there is an ESA on their land
  - considerable anxiety for impacted landowners
  - landowners denied the opportunity to be heard on the matter and better informed of their duties in relation to the land determined an ESA.

## FINDING 7

Some landowners may still be unaware that there is an Environmentally Sensitive Area on their land.

## RECOMMENDATION 6

The Western Australian Government pay landowners impacted by an Environmentally Sensitive Area fair compensation if the value of the property is diminished by the Environmentally Sensitive Area due to the landowner being unable to use the land subject of the Environmentally Sensitive Area in accordance with its zoning use.

## Planning reservations

- 3.99 Planning in WA is comprised of two major components:
- strategic planning, which focuses on big picture framework setting for towns and regions in WA to guide land supply, use and development
  - statutory planning, which involves day to day decision making, guided by legislation, on planning schemes, subdivision and development proposals.<sup>132</sup>
- 3.100 The WAPC is a statutory authority established by the *Planning and Development Act 2005*, which is responsible for state wide strategic planning. The WAPC may include up to 15 members, and its functions include developing and reviewing the State Planning Strategy, the key strategic planning document informing state-wide planning and development

<sup>130</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 21 February 2020, p 7.

<sup>131</sup> Department of Water and Environmental Regulation, Answer to question on notice 7 asked at hearing held 17 February 2020, dated 4 March 2020, p 7.

<sup>132</sup> Department of Planning, *Introduction to the Western Australian Planning System*, Perth, February 2014, p 1.

decisions. The Department of Planning, Lands and Heritage (DPLH) supports the operation of the WAPC.

- 3.101 Statutory planning is largely conducted by local governments, who prepare and administer local planning schemes and strategies to ensure appropriate planning controls for land use and development.<sup>133</sup>

### **The reservation of land for public purposes**

- 3.102 Local governments and the WAPC can reserve land for public purposes under local, regional or state planning schemes. For example, the Metropolitan Region Scheme, which defines the future use of land and provides the legal basis for planning in the Perth metropolitan region, dividing it into broad zones and reservations.

- 3.103 'Public purpose' means a purpose that serves or is intended to serve the interests of the public or a section of the public and includes a public work.<sup>134</sup> Purposes for which land may be reserved include:

- car parks
- civic and cultural amenity
- commonwealth Government
- cultural heritage conservation
- highways and important regional roads
- hospitals
- parks and recreation areas
- port installations
- power services, including electricity and gas supply
- prisons
- public purpose of the State
- railways
- schools
- special uses
- State forests
- universities
- water catchments
- water services, including sewerage and drainage
- waterways.<sup>135</sup>

- 3.104 Land proposed for private use is typically classified as 'zoned', while land proposed for public use is 'reserved'.<sup>136</sup>

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<sup>133</sup> *ibid.*

<sup>134</sup> *Planning and Development Act 2005* s 172.

<sup>135</sup> *ibid.*, schedule 6.

<sup>136</sup> Law Reform Commission of Western Australia, *Compensation for injurious affection*, 2008, p 36.

### **'Sterilisation' of land**

3.105 In some cases, land will be reserved for relatively immediate use—for example, to provide additional land for a project that is already underway. In other cases, it may be reserved for decades in anticipation of a future need—for example, the construction of a major highway.<sup>137</sup>

3.106 In 2004, the PAF Committee observed that:

So far as landholders are concerned, reservation of their land effectively sterilises that land from future development and removes any potential for any future increases in the land's value.<sup>138</sup>

3.107 These concerns still appear to exist today. The Committee heard from a number of submitters who are concerned that the value of their property, their ability to use and enjoy their property, or both, have been adversely affected by planning decisions. Many landowners consider that their land has been 'sterilised' by planning schemes, sometimes leaving them 'in limbo' for decades.

3.108 The Minister for Planning pointed out that it may not always be accurate for landowners to claim that their land has been 'sterilised' through the planning process:

If a landowner's land was "sterilised" for any use but a public use, then it would trigger a claim for compensation under the P&D Act. Frequently landowners can continue to use the land (i.e. for a rural or semi-rural purpose), but cannot yet develop the land to a higher and better use, as might be expected in the future. Deprivation of a right to develop is not a proprietary interest. In other cases, some form of "sterilisation" and a trigger for compensation has occurred. However, either the claim for compensation has not been made, or that claim was made invalidly (such as putting in two claims)...<sup>139</sup>

3.109 Some submitters are frustrated by the impact that seemingly sweeping planning decisions can have on the value of their most important asset. For example, the Committee heard from one couple in the West Mundijong area who missed out on industrial rezoning because of a reservation for a future freight realignment.<sup>140</sup> The submitters contend that this situation has affected the value of their property and made it more difficult to sell on the private market.<sup>141</sup>

3.110 The following case studies illustrate how submitters to this Inquiry have been impacted by zoning or reservation.

### **Case study—Oakajee Narngulu Infrastructure Corridor**

3.111 Narngulu Industrial Estate is a large-scale industrial estate located 12 kilometres south east of Geraldton, designed to accommodate businesses requiring lots of 4.5 hectares, such as transport, logistics and manufacturing businesses.<sup>142</sup>

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<sup>137</sup> *ibid.*

<sup>138</sup> Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7, *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004, p 432.

<sup>139</sup> Hon Rita Saffioti MLA, Minister for Planning, letter, 22 October 2019, p 2.

<sup>140</sup> Submission 10 from Western Australia Land Compensation, 23 July 2019, p 1.

<sup>141</sup> Submission 67 from Susan Downs and Francis Trichet, 31 July 2019, p 1.

<sup>142</sup> Development WA. See: <https://developmentwa.com.au/projects/industrial-and-commercial/narngulu-industrial/overview>. Viewed 3 September 2020.

3.112 Planning for a port and industrial estate at Oakajee commenced in the 1990s.<sup>143</sup> In 2010, the State government commenced planning for the Oakajee Narngulu Infrastructure Corridor (ONIC) to enable a coordinated infrastructure and services corridor around Geraldton. The proposed corridor is 34 kilometres long and will be designed to facilitate significant road, rail and utility services connections between the Narngulu Industrial Estate, the proposed Oakajee port and the existing Geraldton port.<sup>144</sup>

3.113 For the Shire of Chapman Valley, this has resulted in a situation where affected land has been 'sterilised' for development, and its market value adversely affected:

The ONIC is an example of where the State Government plan for land to be developed for public purpose at some time in the future, yet do not assist the affected landowners by acquiring the land or subdividing the land to allow the landowners to move on or develop as they require.<sup>145</sup>

3.114 In June 2019, the Shire of Chapman Valley council voted to allow a development application that lies within the proposed ONIC. A new farm shed is proposed to be clustered with an existing residence, which will ultimately require acquisition and demolition. As the ONIC land has not yet been formalised by the State Government as a service corridor, there was no reason to refuse the development application. Councillor Peter Humphrey said that while the future land acquisition is uncertain, the council should allow the owner to operate his business in as unrestricted a manner as possible.<sup>146</sup>

3.115 Both the Oakajee Estate and the ONIC have been the subject of uncertainty in recent years. The Minister for Planning provided a status update:

On 14 June 2013, Mitsubishi (the initial proponent for the Oakajee Port and Rail, announced intentions to suspend its plans for a port at Oakajee. The Oakajee project requires a proponent exporting sufficient quantities of iron ore at a market price that justifies construction of a new deepwater port.

Creation of the ONIC requires acquisition of private land. Previously, funding (\$39.5 million over four years from 2014-15) was allocated to Department of Planning to acquire land and appropriately zone the ONIC. This funding allocation was withdrawn during the 2015-16 Mid-Year Review.

Further progression of the Oakajee project depends on global demand for iron ore. At this time there are no individual Mid West projects large enough to underpin the project. As such, Government has not allocated funding for land acquisition.<sup>147</sup>

3.116 The Chief Executive Officer of the Shire of Chapman Valley submitted that the WA Government must become quicker and more efficient in dealing with land tenure issues associated with future planning and development, rather than leaving landowners and businesses in limbo for decades. This includes assigning adequate funds to acquire land from affected landowners, and proceeding with acquisition as a matter of priority.<sup>148</sup>

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<sup>143</sup> Hon Rita Saffioti MLA, Minister for Planning, letter, 22 October 2019, p 4,

<sup>144</sup> Department of Planning, Lands and Heritage. See: <https://www.dplh.wa.gov.au/information-and-services/district-and-regional-planning/country-planning/mid-west/oakajee-narngulu-infrastructure-corridor>. Viewed 3 September 2020.

<sup>145</sup> Submission 1 from Shire of Chapman Valley, 2 July 2019, p 1.

<sup>146</sup> *ibid.*, p 3.

<sup>147</sup> Hon Rita Saffioti MLA, Minister for Planning, letter, 22 October 2020, p 4.

<sup>148</sup> Submission 1 from Shire of Chapman Valley, 2 July 2019, p 1.

## FINDING 8

Planning reservations can result in prolonged uncertainty for landowners about the future use and value of their land.

## RECOMMENDATION 7

Where the Western Australian Government reserves land to be used for a public purpose, it should:

- purchase the land, if the landowner wants to sell
- or
- if the landowners does not want to sell, and the land is not immediately required by the Western Australian Government, permit the landowner to develop, use and improve the land in accordance with its existing zoning.

### Case study—Mandogalup

3.117 The suburb of Mandogalup is located in the Town of Kwinana, 30 kilometres south of Perth. Historically populated by market gardeners and dairy farmers, since the 1970s Mandogalup has been home to an Alcoa residue disposal area (Area F). The Committee heard from Mandogalup residents Margaret and Hubert de Haer, whose property is located approximately 500 metres from Area F:

At the time we were told that the lifespan would be 10-20 years, however the licence has been renewed on a number of occasions and it is now close to 50 years old. In 2004, Alcoa committed (after engaging in a period of consultation with community stakeholders) that Area F Residue Lake would be closed in 2010 and rehabilitated by 2015, however this has not occurred.<sup>149</sup>

3.118 The Committee heard that land use and planning in Mandogalup have been uncertain for many years.<sup>150</sup> Mandogalup has been identified for potential urban development on a number of occasions since the 1980s, including by the Jandakot Draft Structure Plan of 1993. However, there are ongoing concerns about urban development due to the potential for residential activities to be impacted by dust from nearby industry, and the potential for urban development to encroach on the Kwinana Industrial Area:<sup>151</sup>

Generally, potential health and amenity impacts from dust in the area have not been well understood. Accordingly, planning decisions have either been deferred or made on the basis of the precautionary principle pending further data from detailed investigations becoming available. Consequently, arguments underpinning land use planning proposals have been subject to applications for review at the State Administrative Tribunal and in the Supreme Court.<sup>152</sup>

3.119 In June 2016, legislation was introduced proposing a buffer zone around the Western Trade Coast industrial area, which stretches from Coogee to East Rockingham. It was argued that the buffer zone was required to prevent urban encroachment and provide planning certainty for industry. The inclusion of Mandogalup in the proposed buffer zone was a blow to locals,

<sup>149</sup> Submission 22 from Margaret and Hubert de Haer, 28 July 2019, p 1.

<sup>150</sup> *ibid.*

<sup>151</sup> Hon Rita Saffioti MLA, Minister for Planning, letter, 22 October 2020, p 8.

<sup>152</sup> *ibid.*, p 8.

who said a legislated buffer would leave them unable to sell, subdivide or further develop their properties.<sup>153</sup>

- 3.120 The result of this ongoing uncertainty is that Mandogalup residents have had difficulty selling their properties. Margaret and Hubert de Haer told the Committee that families in Mandogalup face great financial insecurity. With no end in sight, the situation is particularly stressful for those residents who are retired or approaching retirement, and hope to down size in the near future:

It is extremely difficult to sell land and homes in Mandogalup and has always been this way because of the presence of the Alcoa Residue Lakes and uncertainty in relation to planning and zoning. Many properties remain on the market for years without being sold.

We fear that, even if Mandogalup is eventually zoned industrial, demand for land in the area will only arrive in 20-30 years time (given that only a third of the industrial land in the Kwinana and Rockingham area has been developed).<sup>154</sup>

- 3.121 The Committee understands that the WA Government is currently working to address these concerns. In 2016, the State Government requested that EPA investigate the potential health and amenity impacts of dust in Mandogalup, and provide advice on the size of a land use planning buffer. Advice provided by the EPA in 2017 identified negligible impacts in some areas, and other areas where more investigation monitoring was necessary.<sup>155</sup>
- 3.122 The WAPC has prepared an improvement plan for the area, and is now progressing the preparation of the Mandogalup Improvement Scheme, which will investigate and consider all development scenarios (rural, urban and industrial).<sup>156</sup>

## RECOMMENDATION 8

Where a buffer zone is created and where requested by the landowner, that the Western Australian Government or the protected industries be required to purchase the land at the market value prior to the creation of the buffer zone.

### Utility easements

- 3.123 An easement is a right held by one person to make use of the land of another.<sup>157</sup> An express easement is created by grant, reservation or registration and conferred expressly by an instrument.<sup>158</sup>
- 3.124 An implied easement, on the other hand, is:

An easement that is not expressly created by a grant or reservation in an instrument, but is implied by law. Implied easements recognised by law include easements of necessity, quasi-easements, intended easements, easements implied from the general words implied into all conveyances under legislation (for example (NSW) Conveyancing Act 1919 s 67), easements implied from the description of

<sup>153</sup> Daniel Emerson, 'Fight as zoning hits home values', *The West Australian*, 23 May 2016.

<sup>154</sup> Submission 22 from Margaret and Hubert de Haer, 28 July 2019, p 2.

<sup>155</sup> Hon Rita Saffioti MLA, Minister for Planning, letter, 22 October 2019, p 8.

<sup>156</sup> *ibid.*, p 9.

<sup>157</sup> Macquarie Dictionary Online. See:

[https://www.macquariedictionary.com.au/features/word/search/?search\\_word\\_type=Dictionary&word=easement](https://www.macquariedictionary.com.au/features/word/search/?search_word_type=Dictionary&word=easement). Viewed 25 September 2020.

<sup>158</sup> Lexis Nexis, Encyclopaedic Australian Legal Dictionary. See: [Results for easement](#). Viewed 25 September 2020.

the land, and easements implied under the principle of non-derogation from grant.<sup>159</sup>

- 3.125 The types of easements most likely to affect private property owners in WA are statutory easements, whether express or implied, to facilitate utilities such as water, drainage and electricity.
- 3.126 Easements may be registered against freehold or Crown land under the *Transfer of Land Act 1893* (TL Act). According to Landgate, the types of easements typically presented for registration include rights to:
- erect a party wall
  - take water from wells or bores
  - install and operate drains and drainage works
  - install, maintain and operate oil, gas or other pipelines
  - install, maintain and operate electric power lines, telephone and other cables and supporting pylons.<sup>160</sup>

- 3.127 The PAF Committee explained in 2004:

Although at common law for an easement to be valid it must benefit the holder of another, neighbouring, parcel of land (the "dominant tenement"), s 195 of the *Land Administration Act 1997* expressly provides that the State of Western Australia, a State instrumentality, a statutory body corporate or a local government may create an easement without a dominant tenement.

This provision enables public works and service infrastructure (such as for water and power services) to be constructed and maintained on freehold land by way of an easement corridor, without the necessity for the State or other body having to acquire the freehold of either the land which is the subject of the easement or any neighbouring land.<sup>161</sup>

### **Water Corporation**

- 3.128 As the principal supplier of water, wastewater and drainage services in WA, the state-owned Water Corporation is a land acquiring agency. Under the *Water Services Act 2012*, the Water Corporation may acquire land, or obtain a right to use land, for a water supply, wastewater or drainage project to deliver, expand or improve essential services.<sup>162</sup>
- 3.129 This includes statutory easements that enable it to access parts of property for maintenance or asset repair. Water Corporation easements are registered on title deeds.<sup>163</sup>
- 3.130 The Minister for Water told the Committee about how the Water Corporation balances public and private interests in making these decisions:

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<sup>159</sup> *ibid.*

<sup>160</sup> Landgate, *EAS-01 Easements*, 1 May 2020.

<sup>161</sup> Western Australia, Legislative Council, Standing Committee on Environment and Public Affairs, Report 41, *Petition no. 42 – request to repeal the Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, August 2015, p 28.

<sup>162</sup> Water Corporation. See: <https://www.watercorporation.com.au/-/media/files/residential/about-us/our-commitments/acquiring-land-for-essential-service-works-brochure.pdf>. Viewed 12 February 2020.

<sup>163</sup> Water Corporation. See: <https://www.watercorporation.com.au/home/faqs/buying-selling-and-building/what-is-an-easement-and-how-does-it-affect-my-proposed-building>. Viewed 12 February 2020.



In delivering these essential services, the Corporation balances a range of interests including the impacts of climate change, the wellbeing of its customers, and the economic development of the state. Successfully balancing these imperatives has, over a long period, delivered strong improvements in the value of private property and public assets throughout the State.<sup>164</sup>

### Energy operators

- 3.131 Electricity corporations in WA have strong powers under the *Energy Operators (Powers) Act 1979* to acquire, enter and occupy land, without an easement:

Enter upon and occupy any land or other premises and there, without being bound to acquire the same or any estate or interest therein (except where otherwise provided by this Act or such as may be required by a claimant to be taken under Part 9 of the *Land Administration Act 1997*) by the best available route and in a practicable manner, construct, extend, or improve works, maintain and conduct undertakings and facilities, and carry on undertakings or works requisite, advantageous, or convenient to the exercise and performance of the functions of the energy operator or any such function.

- 3.132 Western Power, Synergy and Horizon are the three corporations supplying energy across WA. Western Power submitted to this Inquiry, telling the Committee that:

Western Power, in the main registers easements for transmission lines operating at 200kV and above. Most of these lines are 330kV lines. Western Power sometimes also obtains easements for 132 kV transmission lines.

Generally, Western Power has no formal easements for its thousands of kilometres of lower voltage distribution lines. Many of these lines exist on private property as permitted under statutory provisions.<sup>165</sup>

- 3.133 The Committee heard that because such easements may limit the way that landowners can use their property, the easements should be disclosed on the Certificate of Title:

Without full disclosure of these encumbrances, there is an unfair devaluation of property through implied threat even when none exists. These should be fully disclosed at the time of issue so that they can be addressed by the owner of the land immediately.<sup>166</sup>

- 3.134 One submitter told the Committee that had he known about the implied easement for energy operator access on his property, he would have sought legal advice prior to purchase.<sup>167</sup>

- 3.135 The Committee acknowledges that an easement can limit or restrict property use. According to the Western Power website:

If you have an easement registered on your property, there may be some restrictions on the activities you can perform or structures you can place within the easements.<sup>168</sup>

- 3.136 Although such easements can be registered on a Certificate of Title as per Part 3 of the TL Act, unlike Water Corporation easements, they typically are not. Landgate advised the

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<sup>164</sup> Hon Dave Kelly MLA, Minister for Water, letter, 17 October 2019, p 1.

<sup>165</sup> Submission 70 from Western Power, 31 July 2019, p 2.

<sup>166</sup> Submission 75 from David and Gail Guthrie, 31 July 2019, p 1.

<sup>167</sup> Submission 7 from Terrence Ealing, 18 July 2019, p 5.

<sup>168</sup> Western Power. See: <https://westernpower.com.au/safety/360-aware/industry-safety/easements/>. Viewed 3 September 2020

Committee that there is currently no requirement for statutory easements to appear on the Certificate of Title to be legally effective.

3.137 However, the Western Power website states that:

In some areas Western Power may have an easement registered on the Certificate of Title.<sup>169</sup>

3.138 While this may be the case in some areas, the Committee is aware that in practice, not all energy operator easements are registered on the Certificate of Title.<sup>170</sup>

## **FINDING 9**

Statutory easements may be registered on Certificates of Title, but this is not always the case.

3.139 Western Power acknowledge that it is important for customers to have access to information that allows them to understand the encumbrances on their property:

That's why we recently updated our GIS spatial mapping into Landgate layers to ensure our safety clearance zone/easements are visible to external entities via Landgate's publicly available 'Shared Location Information Platform', accessible on their website.<sup>171</sup>

3.140 The Committee notes that the section of the Western Power website that explains easements does not direct visitors to the Landgate website, where they may use the Shared Location Information Platform to ascertain if their property is impacted by an easement or encumbrance, and its location on the property.

## **RECOMMENDATION 9**

The Minister for Energy direct Western Power to include a link to Landgate's Shared Location Information Platform on its website, and inform readers that geographical information system mapping will identify whether their property is impacted by a Western Power encumbrance.

## **Bush Fire Prone Areas**

3.141 In 2015, the Department of Fire and Emergency Services implemented a series of reforms in response to the findings of 'Shared Responsibility: The Report of the Perth Hills Bushfire February 2011 Review'.<sup>172</sup> The reforms included the gazettal and release of the first edition of the Map of Bush Fire Prone Areas, which identified areas that are subject, or likely to be subject, to bushfire attack:

Additional planning and building requirements may apply to new proposals within a Bush Fire Prone Area. These requirements ensure future developments within a Bush Fire Prone Area are better prepared to manage the risk of bushfire.<sup>173</sup>

3.142 Owners of land in Bush Fire Prone Areas will be required to obtain and comply with a Bushfire Attack Level Assessment in order to build, which will involve a level of time, effort and expense on the landowners part.

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<sup>169</sup> *ibid.*

<sup>170</sup> For example, Submission 7 from Terrence Ealing, 18 July 2019.

<sup>171</sup> Submission 70 from Western Power, 31 July 2019, p 2.

<sup>172</sup> Submission 54 from Department of Fire and Emergency Services, 31 July 2019, p 1.

<sup>173</sup> *ibid.*

## Conclusion

- 3.143 From planning reservations that linger for years to environmental regulations that restrict land use, there are a range of ways that the WA Government can interfere with the use and enjoyment of private property to achieve public benefit. This Chapter was not an exhaustive list of encumbrances, but highlighted a few examples that feature prominently in this Inquiry.
- 3.144 From one encumbrance to the next, the laws and processes in place to ensure that interests are adequately disclosed, and properly compensated for, can vary significantly. The remainder of this Report will consider where potential improvements can be made.

## CHAPTER 4

### The need for disclosure

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#### Introduction

- 4.1 The Committee has been asked to inquire into the probity of the Torrens title system and the case for registering encumbrances that affect land, including ESAs, Bush Fire Pone Areas, and electricity easements that currently sit behind the Certificate of Title.
- 4.2 This Chapter will outline:
- the Torrens title system
  - the perceived threat to the Torrens title system caused by the non-disclosure of interests on the Certificate of Title
  - current measures aiming to address this threat
  - options for improvement.

#### The Torrens title system

- 4.3 The Torrens title system is 'a system of land title under which a State-maintained register of land holdings guarantees indefeasible ownership of land'—that is, ownership that is not capable of being annulled, voided or undone.<sup>174</sup>
- 4.4 The Torrens system was first introduced in South Australia in 1857 to simplify the Deeds system that Australia inherited from England. Countries across the world have since adopted similar systems of land titling.<sup>175</sup> The Committee refers readers to the 2004 Inquiry for more comprehensive coverage of the history and characteristics of the Torrens title system.<sup>176</sup>
- 4.5 The TL Act implements the Torrens system in WA. The WA Land Information Authority, a statutory authority trading under the business name Landgate, administers the TL Act and oversees property ownership in WA. Landgate provide a secure land titles system, land valuation and location information including titles, property sales reports, maps and satellite imagery.<sup>177</sup>
- 4.6 According to Landgate:
- WA's Torrens regime delivers a strong, accurate, efficient and reliable land titles system, upon which financial investment and development in land, for commerce, housing and agriculture can occur with confidence. It provides certainty and security of land titles through these three key legal principles:
1. Certainty (known as indefeasibility) of registered title;
  2. Guarantee of that registered title by the State Government; and

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<sup>174</sup> Lexis Nexis, Encyclopaedic Australian Legal Dictionary. See: [Torrens title](#). Viewed 25 September 2020.

<sup>175</sup> Western Australia, Legislative Council, Public Administration and Finance Committee, Report 7, *The impact of State Government actions and processes on the use and enjoyment of freehold and leasehold land in Western Australia*, May 2004, p 30.

<sup>176</sup> Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7, *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004.

<sup>177</sup> Landgate. See: <https://www0.landgate.wa.gov.au/about-us/our-story>. Viewed 8 January 2020.

3. Compensation payable by the State in certain circumstances, including fraud and error.<sup>178</sup>

### **Certificate of Title**

- 4.7 A Certificate of Title is an official land ownership record. The TL Act requires that a separate Certificate of Title be created and maintained on the Register of Lands for each parcel of land.<sup>179</sup> The purpose of the Register of Lands is to record property ownership in a publicly accessible way.
- 4.8 A limited number of other interests or encumbrances have traditionally been registered on the Certificate of Title, including mortgages and leases.<sup>180</sup>
- 4.9 The Registrar of Lands may only register on a Certificate of Title those interests that have a head of power and statutory authority under the TL Act or other relevant legislation. Examples of registerable interests include land transfers (whether by fee simple, non-payment of rates, transfer of lease etc), statutory and non-statutory restrictive covenants, mortgages, leases and carbon rights.<sup>181</sup> A full list of interests that may currently be registered on a Certificate of Title can be found at Appendix 7.
- 4.10 According to the Landgate website, the Certificate of Title provides:
- current ownership details
  - volume and folio
  - survey plan number and type
  - document numbers for encumbrances and notifications
  - whether there is a caveat against the title.<sup>182</sup>
- 4.11 Anyone can order a copy of the Certificate of Title for any property in WA through Landgate for \$26.50.

### **Indefeasibility**

- 4.12 A key feature of the Torrens title system is the principle of indefeasibility, or certainty, of title. This is enacted by section 63 of the TL Act, which provides that a Certificate is to be conclusive evidence of title:

No certificate of title created and registered upon an application to bring land under this Act or upon an application to be registered as proprietor on a transmission shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate; and every certificate of title created and registered under any of the provisions herein contained shall be received in all courts of law as evidence of the particulars therein set forth or incorporated and of the entry thereof in the Register, and shall be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in or power to

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<sup>178</sup> Submission 69 from Landgate, 31 July 2019, p 3.

<sup>179</sup> *Transfer of Land Act* s 48(1).

<sup>180</sup> Justine Bell, 'The Shared Land Information Platform in Western Australia: A blueprint for sustainable management of land?', *Flinders Law Journal*, 2010, vol. 12, 2, p 107.

<sup>181</sup> Landgate, Answer to question on notice 5 asked at hearing held 19 February 2020, dated 6 March 2020, p 2.

<sup>182</sup> Landgate. See: <https://www0.landgate.wa.gov.au/titles-and-surveys/certificate-of-title>. Viewed 3 September 2020.

appoint or dispose of the land therein described is seized or possessed of such estate or interest or has such power.<sup>183</sup>

- 4.13 Only 'registerable' interests will be included on a Certificate of Title. It appears that there is no neat definition of registerable interests, with Landgate struggling to provide clarity:

**The CHAIR:** You used the term "registered interest in land". Who determines whether an interest is a registered interest or a non-registered interest?

**Ms DUKES:** It is within the legal framework of the operation of the Torrens system in Western Australia. It is mainly legislative general law and some of it is made by the courts. It determines what is registrable and what is not. Essentially, it is an interest in land that would be registrable. The registrar of titles will register those things that are compliant with the legal framework of the Torrens principles and that broader legal framework.

**The CHAIR:** Would you be able to provide the committee with a list of all those interests that are registered interests?

**Ms DUKES:** No, it is a legal definition of interests in land but generally the types of things that you would find are changes of ownership such as transfers of land, mortgages—so financing—and leases. They are the main things that are interest in land, and subleases and things like that, so the traditional things—easements and restrictive covenants; that sort of thing. We do not have a definitive list. I do not think it would be possible to get one.

**The CHAIR:** You refer to a legal definition. Can you provide the legal definition to the committee?

**Ms DUKES:** No. I cannot do that because it is an open definition. It is interests in land so it depends on particular circumstances. Sometimes legislation creates new interests on land so that would be regarded as a new interest, but it is generally years of property law that we have incorporated—"we" being the state—into the Torrens system.<sup>184</sup>

- 4.14 In some cases, legislation allows for notifications about certain matters to be placed on a Certificate of Title. For example, the WAPC may place notices on the Certificate of Title regarding bushfires, hazards or other factors seriously affecting the use and enjoyment of the land.<sup>185</sup> As noted at paragraphs 3.136–3.138, statutory easements may be registered on a Certificate of Title, but this is not always the case.

### The 'threat' to the Torrens title system?

- 4.15 The motion referring this Inquiry to the Committee suggests that the Torrens title system in WA may be under threat because certain encumbrances that affect land, such as ESAs, Bush Fire Prone Areas and implied easements are not registered on the Certificate of Title.

- 4.16 The Hon Rick Mazza MLC, who moved the motion that established this Inquiry, told the Committee:

Land owners have a right to know what encumbrances are placed on their land that they have or are about to acquire by way of notices registered on the certificate of title so that they can make informed business decisions.<sup>186</sup>

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<sup>183</sup> *Transfer of Land Act* s 63(1).

<sup>184</sup> Susan Dukes, Commissioner of Titles, Landgate, transcript of evidence, 19 February 2020, p 5.

<sup>185</sup> Submission 69 from Landgate, 31 July 2019, p 2.

<sup>186</sup> Submission 60 from Hon Rick Mazza MLC, 31 July 2019, p 9.

- 4.17 The Committee heard that all interests, limitations, encumbrances and notifications that restrict the usage or enjoyment of the land should be registered on the Certificate of Title:
- We agree that all encumbrances should be shown on the Title. Implied easements from the Water Corporation should also be shown. If these encumbrances are to be placed on titles then, if the encumbrance affects the land value, compensation should be available.<sup>187</sup>
- 4.18 A Perth-based property settlement agent told the Committee that failure to reflect implied easements, ESAs and Bush Fire Prone Areas on the Certificate of Title undermines both the Torrens system and Landgate:
- As a Settlement agent, I find it difficult to obtain information aforementioned, therefore, what chance do you think that the general public have?<sup>188</sup>
- 4.19 Many submitters agree. For example, WAFarmers submit that any limitation on a landholders use or enjoyment of a property must be communicated to the landholder and registered in an easily accessible electronic format linked to the Torrens title:<sup>189</sup>
- There is no doubt that Torrens' system was constructed on firm foundations: reliability, simplicity, low cost, speed and suitability. However its ability to register all the encumbrances, interests and limitations on land usage has struggled to keep up with the wave of restrictions that commonwealth and state governments are imposing over landholders.<sup>190</sup>
- 4.20 Conversely, Landgate suggest that to include all property interests on the Certificate of Title would pose a threat to the probity of the Torrens title system by potentially undermining the principle of indefeasibility. Landgate submit that the Certificate of Title is not the appropriate mechanism for disclosing all interests in land:
- The purpose of the Torrens system of title by registration is not to record 'all' interests and factors affecting the use and enjoyment of land on the certificate of title.
- Entering all such factors and estates and interests onto the land Titles Register alone would not ensure they receive the protection of registration granted under the Torrens system, and would be complex and difficult to practically maintain.<sup>191</sup>
- 4.21 Furthermore, Landgate submit that the Torrens title system does not guarantee full disclosure on the Certificate of Title of everything that may possibly affect the use and enjoyment of land:
- An interest recorded on the WA land Register is only one way by which the rights and interests of owners of land can be lawfully affected.
- Given the potential number of interests that may apply to a parcel of land, it would be both inefficient and impractical to require all interests to appear and be maintained on the certificate of title.<sup>192</sup>
- 4.22 The Hon Stephen Dawson MLC said in the Legislative Council, during debate on the motion moving this Inquiry:

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<sup>187</sup> Submission 10 from Western Australia Land Compensation, 23 July 2020, p 1.

<sup>188</sup> Submission 36 from Plus Your Settlements, 30 July 2019, p 1.

<sup>189</sup> Submission 6 from WAFarmers, 18 July 2019, p 2.

<sup>190</sup> Submission 6 from WAFarmers, 18 July 2019, p 1.

<sup>191</sup> Submission 69 from Landgate, 31 July 2019, p 2.

<sup>192</sup> *ibid.*, p 5.

It may increase the complexity of conveyancing and require professionals to advise of the meaning and the relevance of those interests, and it could also potentially slow down the conveyancing process. It could also increase costs...<sup>193</sup>

- 4.23 The Committee notes these concerns, particularly as they relate to cost. If a person seeks to make a change on the title register, this must be done in accordance with the TL Act. The prescribed Landgate fee for lodging such a change is \$178.20. Other legislation may govern this process in the case of agencies registering interests in land (for example, the *Heritage Act 2018*), but the process will follow that contained in the TL Act.<sup>194</sup>
- 4.24 The party benefitting from the change pays the cost. By way of example, the Water Corporation may lodge notifications, memorials and easements against land for a variety of reasons. Where a land owner applies for a service that does not conform with the level of service required by the Water Corporation's licence, the Water Corporation may lodge a notification of special condition on the Certificate of Title. The land owner pays the cost of lodging the notification—in this instance, the \$178.20 Landgate fee and the \$286.11 Water Corporation fee. However, when the Water Corporation registers an easement to protect its assets over private land, it pays the \$178.50 Landgate fee.<sup>195</sup>

### Previous inquiries

- 4.25 In its 2001-04 inquiry into the impact of state government actions and processes on the use and enjoyment of freehold and leasehold land in WA, the PAF Committee considered the registration of restrictions on land use.

- 4.26 After hearing from stakeholders who were unaware of restrictions on their property, the PAF Committee formed the view that:

with the benefit of modern information technology, 3-D map making abilities and the Internet, it is no longer an acceptable excuse to argue that a restriction on land use could not be accurately depicted on a Certificate of Title.<sup>196</sup>

- 4.27 The then-Department of Lands Administration (DOLA) held a similar view:

It is a fundamental part of this submission that the efficiency and integrity of the land registration system (through the Torrens system) is being eroded because many of the limitations and prohibitions affecting land and interests in land are not collected and are not centrally available for access by everyone.

There is a strong need for customers and persons dealing in land in Western Australia to have one central point of contact to search all interests in land and any limitations, prohibitions and other notifications that could affect that land. It is proposed that the Torrens Register remains the central point of record for those interests currently registered and that other unregistered interests be easily accessible, to allow a clear picture to be developed for anyone requiring the information.<sup>197</sup>

- 4.28 Given that DOLA had identified over 180 interests which were not recorded on the Certificate of Title, it suggested that to register all restrictions affecting a parcel of land on the

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<sup>193</sup> Hon Stephen Dawson MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 June 2019, p 4018.

<sup>194</sup> Grahame Gammie, Chief Executive Officer, Landgate, email, 31 July 2020.

<sup>195</sup> Pat Donovan, Chief Executive Officer, Water Corporation, email, 6 August 2020.

<sup>196</sup> Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7, *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004, p 526.

<sup>197</sup> *ibid.*, pp 524-5.



Certificate of Title would be 'administratively difficult and cost prohibitive'.<sup>198</sup> However, DOLA agreed that an accessible 'one stop shop' mechanism for finding this type of information must be developed.

4.29 The PAF Committee made three main recommendations in relation to registering restrictions and other such interests:

- That, in the short term, the Department of Land Information continue to implement its aim of establishing itself as a "one stop shop" database of all interests affecting land as an urgent priority (recommendation 35).
- That, for the long term, the Department of Land Information introduce, as soon as practical, an electronic three dimensional Certificate of Title which records all interests affecting the land described on the Certificate of Title (recommendation 36).
- That, the Government introduce, after a two year phase in period, legislative requirements that:
  - (a) any policy, strategy, plan or other document impacting on administrative decision making with respect to land use that affects one or more specific certificates of title, is to be of no effect unless it is registered with the Department of Land Administration; and –
  - (b) all policies, strategies, plans or other documents impacting on administrative decision-making with respect to land use that are specific to a Certificate of Title are to be, upon registration with the Department of Land Information, cross-referenced with the relevant Certificate of Title (recommendation 37).<sup>199</sup>

4.30 The WA Government supported recommendation 35, noting that DOLA was developing a land information platform to integrate and provide access to land information from across government:

The system will enable interested parties to source a wide range of government land information including key details about rights, restrictions and obligations associated with a land parcel or certificate of title.<sup>200</sup>

4.31 However, the WA Government did not support recommendation 36 or 37. Recommendation 36 related to expanding the range of interests recorded on the Certificate of Title. DOLA had identified over 180 interests in land that were not registered on Certificates of Title at the time, including native title claims, planning and conservation policies, heritage listing and contaminated sites. To register all of these on Certificates of Title would be 'administratively difficult and cost prohibitive'. Furthermore:

A certificate of title has the benefit of a State guarantee as to its accuracy. With the recording of all "possible" interests affecting land on the certificate of title, it would not be feasible to extend this guarantee to all items and this may have the effect of eroding the integrity and indefeasibility of the certificate of title.<sup>201</sup>

4.32 The Minister for Lands told the Committee in 2019 that this position remained unchanged.<sup>202</sup>

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<sup>198</sup> *ibid.*, p 526.

<sup>199</sup> *ibid.*, p 530.

<sup>200</sup> Government of Western Australia, *Response of the Western Australian Government to the Western Australian Standing Committee on Public Administration and Finance*, 2004, p 29.

<sup>201</sup> *ibid.*

<sup>202</sup> Hon Ben Wyatt MLA, Minister for Lands, letter, 1 November 2019, p 9.

- 4.33 Recommendation 37 proposed a legislative requirement that all policies, strategies and plans affecting land use be registered. The WA Government did not support the recommendation on the basis that it was impractical and cost prohibitive. The Minister for Lands maintained that position in 2019:

There are an enormous number of Commonwealth, State and Local Government policies, strategies, plans and other documents that may impact on administrative decision-making with respect to land use.

It would be impractical to record all of these on the certificate of title and impractical and very difficult to keep the information current and reliable. In addition, unlike a certificate of title, none of this information can nor should be guaranteed by the State.

Previous estimates place the cost of establishing such a system in the vicinity of \$50 million (\$68 million adjusted for inflation) with operating costs in the vicinity of \$10 million (\$13.7 million adjusted for inflation) per annum. These costs would ultimately have to be passed onto consumers (in the main, landowners) and would make obtaining or amending a certificate of title cost prohibitive.

As noted in Recommendation 35, individuals can obtain information on interests affecting a parcel of land through the SLIP and a PIR. However, the certificate of title is the primary reference point. This approach is considered a more practical and cost-effective means of addressing the main concerns that this recommendation seeks to address and resolve.<sup>203</sup>

- 4.34 For the full recommendations of the PAF Committee, the corresponding government responses and implementation updates, see Appendix 2.

### Shared Land Information Platform

- 4.35 Recommendation 35 has since been implemented.<sup>204</sup> The WA Government began developing the Shared Land Information Platform (SLIP) in 2004, aiming to link and open access to location information held by a range of government agencies.<sup>205</sup> Rather than assembling all relevant data in one place, the SLIP draws on and provides access to that data, which remains in the custody of the relevant government agency.<sup>206</sup> By 2012, the SLIP included access to over 400 datasets.
- 4.36 Members of the public may search their address free of charge on the Landgate website using the interactive mapping tool. Interactive mapping displays information such as boundaries, local government area and sales history. Landgate also offers nine products for purchase with more detailed property information (see Table 1).

Table 1. *Property documents available for purchase*

Document	Contains	Price
Certificate of Title	Owner details, lodged or registered interests or claims (encumbrances) against that ownership.	\$26.20
Plan	Graphical depiction of land parcels such as lots, roads, easements and other interests.	\$26.20

<sup>203</sup> Hon Ben Wyatt MLA, Minister for Lands, letter, 1 November 2019, p 9.

<sup>204</sup> *ibid.*, p 8.

<sup>205</sup> The Government of Western Australia, *A Location Information Strategy for Western Australia*, November 2012, p 32.

<sup>206</sup> Justine Bell, 'The Shared Land Information Platform in Western Australia: A blueprint for sustainable management of land?', *Flinders Law Journal*, 2010, vol. 12, 2, p 119.

Document	Contains	Price
Property Interest Report	Comprehensive property report that identifies interests not shown on the Certificate of Title.	\$60.00
Single Property Sales Report	Sales history for an individual property including lot size, beds, baths, survey details and build year.	\$6.50
Suburb Sales Report	Sales history of any suburb or local government area.	\$36.40
Gross Rental Value Extract	Last three gross rental values, title and property details and past, future and current valuation dates.	\$8.50
Unimproved Land Value Extract	Last three unimproved land values, title and property details and past, future and current valuation dates.	\$8.50
Title Watch	Online title monitoring services that sends automatic email notifications when an action is detected on a Certificate of Title. 12-month subscription that starts immediately.	\$31.50
Aerial Photography	Full aerial view of a single property, street or suburb. Historic photography shows changes to Perth suburbs since 1948.	\$28.24

[Source: Landgate. See: <https://www0.landgate.wa.gov.au/property-reports/single-address-report/property-interest-reports>. Viewed 25 September 2020.]

### Property Interest Report

4.37 SLIP has enabled Landgate to create and offer a Property Interest Report (PIR) for any given parcel of land. PIRs have been available since 2007.<sup>207</sup> The PIR serves as a guide to interests that relate to this property not recorded on the Certificate of Title, and includes:

- information about the property, including aerial photography and other details
- a summary of interests that affect the property
- a summary of interests that do not affect this property
- details of interests that affect the property.<sup>208</sup>

4.38 Landgate provided the Committee with a sample PIR, which is also available on the Landgate website.<sup>209</sup> At a cost of \$60, Landgate submit that the PIR is an appropriate, effective and inexpensive means by which any member of the public can access detailed information relevant to a parcel of land.<sup>210</sup> Since 2013, Landgate has only received two complaints about the accuracy of PIRs.<sup>211</sup> A list of interests included in a PIR can be found at Appendix 8.

4.39 In 2004, DOLA identified 'at least 180 interests that affect land'.<sup>212</sup> Identifying this list of interests took approximately 18 months. Landgate has not kept a record of all subsequent legislation, regulation and policy changes that create new interests, and was not able to

<sup>207</sup> Graeme Gammie, Chief Executive Officer, Landgate, letter, 6 March 2020, p 2.

<sup>208</sup> Submission 69 from Landgate, 31 July 2019, p 8.

<sup>209</sup> Submission 60 from Landgate, 31 July 2019.

<sup>210</sup> *ibid.*, p 2.

<sup>211</sup> Landgate, Answer to question on notice 8 asked at hearing held 19 February 2020, dated 6 March 2020, p 4.

<sup>212</sup> Government of Western Australia, 'Response of the Western Australian Government to the Western Australian Standing Committee on Public Administration and Finance', 2004, p 29.

provide the Committee with an authoritative current number of Government interests in land.<sup>213</sup>

- 4.40 The PIR currently covers 91 interests in land, and is built to accommodate further interests that may exist in the future.<sup>214</sup> Although Landgate cannot confirm the total number of interests, the Committee assumes it is more than 91. Landgate continuously consult across the WA Government to identify and add new interests—for example, 12 Water Corporation interests were added in November 2019.<sup>215</sup>
- 4.41 A full list of interests currently available in the PIR can be found at Appendix 7. These interests include:
- Bush Fire Prone Areas
  - Western Power Infrastructure
  - Waterways Conservation Act Management Areas
  - Water Corporation infrastructure
  - Environmental Protection Policies
  - possible road widening
  - future state roads
  - threatened flora and fauna
  - wetlands/Ramsar Wetlands
  - Heritage Council Conservation Order
  - Region/Local Planning Schemes
  - Groundwater Salinity
  - Bush Forever Areas
  - Native Vegetation
  - Aboriginal Heritage Places.
- 4.42 Landgate is not able to record on the SLIP all privately created interests in land, such as private agreements and unregistered easements.<sup>216</sup>

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<sup>213</sup> Graeme Gammie, Chief Executive Officer, Landgate, email, 30 July 2020.

<sup>214</sup> Landgate, *Interests currently available in Property Interest Report*, July 2020.

<sup>215</sup> Landgate, Answer to question on notice 4 asked at hearing held 19 February 2020, dated 6 March 2020, p 2.

<sup>216</sup> Hon Ben Wyatt MLA, Minister for Lands, letter, 1 November 2020, p 7.

Figure 1. Extract from sample Property Interest Report

## 4. Details of interests that **AFFECT** this property

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	<b>Legislation governing the interest:</b> <i>Water Agencies (Powers) Act 1984</i> Water Agencies (Water Use) By-laws 2010
<b>Water Corporation Infrastructure (above and below ground)</b> <b>Responsible agency:</b> Water Corporation	<b>Definition of Interest:</b> The Water Corporation operates vast water, sewerage and drainage pipe networks throughout WA. At any given location there may be various infrastructure in the ground of different sizes, depths, alignments and materials belonging to the Water Corporation. <b>Affect of Interest:</b> The selected property <b>is impacted</b> by Water Corporation pipes or access chambers. No construction is permitted in the proximity of this infrastructure without the consent of the Water Corporation and it should be noted that 24 hour access may be required for maintenance purposes in certain circumstances. <b>Sewer Infrastructure:</b> <b>Infrastructure Type</b> - Sewer Main  Water and sewer services located outside the property boundaries (road reserves) are not included in this report, as this report only includes interests inside the property boundaries. However they can be viewed here, <a href="http://www.mywater.com.au/css-web-external/pub/propertySearch">www.mywater.com.au/css-web-external/pub/propertySearch</a> .  Please be aware that it is a <b>legislative requirement</b> to notify the Water Corporation of any proposed construction, alteration or demolition of a building in areas where the Corporation is the licensed provider of water, wastewater or drainage services. A person is not permitted to construct, alter or demolish a building without the prior authorisation of the Water Corporation.  For more information contact our office on 13 13 95, or see <a href="http://www.watercorporation.com.au/moving-buying-and-building/buying-or-selling">www.watercorporation.com.au/moving-buying-and-building/buying-or-selling</a> .

[Source: Submission 60 from Landgate, 31 July 2019, p 12.]

- 4.43 Prior to the SLIP and its associated products, prospective purchasers and other interested individuals may have been required to make upwards of 20 inquiries with a range of government agencies. In theory, the availability of the SLIP should reduce this number significantly. The result is lower transaction costs for landholders and prospective purchasers.
- 4.44 Associate Law Lecturer Justine Bell argued in 2010 that in this regard, WA was ahead of most other Australian jurisdictions.<sup>217</sup> Today, most Australian jurisdictions have various spatial systems in place allowing people to find planning information relating to their land. Victoria and South Australia now also offer detailed property reports, though the Committee notes a South Australian property report costs \$296, significantly more than a PIR in WA.<sup>218</sup>
- 4.45 When experimenting with the SLIP from Perth, the Committee found the maps to be slow to load and often difficult to understand. The Committee notes that this complex system may present access barriers to people living in regional or remote areas with slower internet speeds, and that many people would not be familiar with using this type of system.

### FINDING 10

Landgate's Property Interest Reports contain information about a wide range of interests affecting property that are not listed on the Certificate of Title.

<sup>217</sup> Justine Bell, 'The Shared Land Information Platform in Western Australia: A blueprint for sustainable management of land?', *Flinders Law Journal*, 2010, vol. 12, 2, p 105. .

<sup>218</sup> South Australian Integrated Land Information System, *SAILIS price list 2018-19*, 2018.

## FINDING 11

Property Interest Reports cannot be relied on to disclose all interests affecting land.

### An appropriate mechanism for disclosing interests?

4.46 Despite the ability to procure a PIR, many submitters to this Inquiry remain concerned that the failure of the Certificate of Title to disclose all interests that affect land is a threat to the Torrens title system.

4.47 When speaking to his motion on this topic, the Hon Rick Mazza MLC stated that prospective purchasers should not be expected to look further than the Certificate of Title for information about restrictions on their land use:

People should not have to seek out information themselves that could have implications on their land use. Many matters affecting land are now behind title and the information needs to be sought out separately from a title search, which undermines the integrity of the Torrens title system.<sup>219</sup>

4.48 However, Landgate maintain that the PIR is the most appropriate mechanism for disclosing most interests and restrictions:

If all other interests affecting land appeared on the certificate of title, it would clutter the title with information and make the certificates of title more difficult for people to understand. The PIR complements a title search and provides a richness of information and detail on interests that affect the land, and interests that do not apply to the land, that could not be practically replicated on a certificate of title.

Landgate encourages anyone looking to purchase a property to obtain a PIR to help them fully understand what other interests may affect their future use of the land. It is equally useful for current owners to be up to date if they are considering any changes to their property.

The complexity and expense of seeking to integrate all this information into certificates of title is contrary to the essence of the underlying principles of WA's Torrens titles system of simplicity, efficiency and cost effectiveness.<sup>220</sup>

4.49 The Minister for Environment expressed a similar view:

There never was an intention for such rights and interests affecting land and land use to be shown on the certificates of title, nor to be guaranteed by the government. There is a difference between legal interests in land and factors affecting the use and enjoyment of land.<sup>221</sup>

4.50 The Committee notes that the Minister for Environment did not elaborate on what those differences may be.

4.51 While cost, practicality and the potential for increased complexity are all factors, the inability to guarantee the interests included in a PIR appears to be a key reason:

The state is not willing—in fact, it is not able—to guarantee such a large category of other interests.<sup>222</sup>

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<sup>219</sup> Hon Rick Mazza MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 June 2019, p 4008.

<sup>220</sup> Submission 69 from Landgate, 31 July 2019, p 5.

<sup>221</sup> Hon Stephen Dawson MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 June 2019, p 4018.

<sup>222</sup> *ibid.*, p 4018.

- 4.52 Information contained in a Certificate of Title is indefeasible, or guaranteed. Indefeasibility does not, however, attach to a PIR. Murdoch University School of Law lecturer Lorraine Finlay suggests that we should consider why the Government is unable to assign such a guarantee when it has created the restrictions in question in the first place:

If the government contends that the interests created are so numerous and complicated that it is simply too onerous a task to track and record them, perhaps that is an indication that the State is simply creating too many encumbrances and imposing too great a burden on individual property owners.<sup>223</sup>

### FINDING 12

The Western Australian Government is unwilling and unable to guarantee the information contained in a Property Interest Report.

- 4.53 Because the system is dependent on individual government agencies as data custodians, Landgate acknowledge that the PIR is not appropriate as a single point of reference:

**Mr GAMMIE:** To make the property interest report the sole place that people go to is probably not practical at this point in time. What the property interest report endeavours to do, as I mentioned before, is provide that simple point of entry for people to find out what relates to their particular title. It is a very dynamic system.

**The CHAIR:** If they identify that there is an interest that is not on their certificate of title but is in the property interest report, do they then need to go to that relevant department to get more information?

**Mr HOFMANN:** Correct. The report has a fantastic interest dictionary, so if you click on the interest in question, it gives you a formal description of how it works, who is the responsible agency, the legislation that is part of where that interest comes from and contact details as well. When you get the report, it shows that same level of information.<sup>224</sup>

### FINDING 13

Landgate's Shared Land Information Platform and Property Interest Reports are the Western Australian Government's preferred tools for disclosing a range of interests in land.

- 4.54 The idea that a statutory easement can be registered on a Certificate of Title, but an ESA declaration cannot, seems contrary. The Committee is not convinced by the WA Government's position that interests listed in the PIR are inappropriate for listing on a Certificate of Title.

### RECOMMENDATION 10

The Minister for Lands direct Landgate to inquire into and report on:

1. measures that need to be implemented and the resources required for the Western Australian Government to guarantee information contained in a Property Interest Report and on the Shared Land Information Platform is accurate and complete

<sup>223</sup> Submission 47 from Lorraine Finlay, 31 July 2019, p 5.

<sup>224</sup> Graeme Gammie, Chief Executive and Roberto Hofmann, Account Manager, Natural Resource Management and Critical Infrastructure, Landgate, transcript of evidence, 19 February 2020, p 7.

2. the implications, including financial costs, for Western Australian Government agencies and landowners if the Western Australian Government were to require all government-imposed interests affecting land to be registered on the Certificate of Title.

The Minister for Lands table the report in both Houses of Parliament by June 2023.

### Issues with the Property Interest Report

- 4.55 According to Lorraine Finlay, while the PIR is a positive step forward, it is not itself entirely sufficient:

For one thing, it increases complexity by requiring people to go behind the Certificate of Title to obtain a full picture of the particular property.<sup>225</sup>

- 4.56 PIRs cover many, but not all, interests and encumbrances that may affect the use and enjoyment of the land. In the Committee's view, this affects their level of utility.
- 4.57 Because the SLIP is a state-centric system, it does not often reflect interests or encumbrances imposed by the federal government. The Committee queried whether members of the public would be aware of this:

**The CHAIR:** When someone looks up a property interest report on the Landgate website, will it, in that section of other information, actually inform the searcher that they should look to a commonwealth website for information about any commonwealth interests in relation to their property?

**Mr HOFMANN:** Not that I am aware of.

**The CHAIR:** Do you think that it would be a good idea to do that?

**Mr GAMMIE:** It is certainly something we can take on board.<sup>226</sup>

- 4.58 The Landgate website states that a PIR provides 'all known property interests in one report'.<sup>227</sup> The Committee considers that this could be misleading. Nothing on the PIR webpage indicates that the PIR may not reflect interests imposed by other levels of government, or all WA Government interests affecting land.

### RECOMMENDATION 11

Landgate include a disclaimer on its website about the types of interests that are not included in Property Interest Reports, such as those administered by the Commonwealth Government and local governments, and some Western Australian Government interests affecting land, and where people can find information about such interests.

### RECOMMENDATION 12

Landgate include a disclaimer on Property Interest Reports advising that not all interests affecting land are included in the Reports or the Shared Land Information Platform.

- 4.59 Even when a PIR and Certificate of Title are purchased together, an individual could not be confident that other interests do not exist. While Landgate is coming closer to being a 'one-

<sup>225</sup> Submission 47 from Lorraine Finlay, 31 July 2019, p 4.

<sup>226</sup> Graeme Gammie, Chief Executive and Roberto Hofmann, Account Manager, Natural Resource Management and Critical Infrastructure, Landgate, transcript of evidence, 19 February 2020, p 8-9.

<sup>227</sup> Landgate. See: <https://www0.landgate.wa.gov.au/property-reports/single-address-report/property-interest-reports>. Viewed 3 September 2020.



stop shop', the Committee is of the view that improvements could be made. Such improvements largely depend on other government agencies, as the data custodians:

The dependency is in terms of Landgate becoming aware, as an agency, and letting us know in the first instance. It then needs to be mapped and added as a layer into the SLIP system and then attached to the property interest report.<sup>228</sup>

#### **FINDING 14**

Only 91 Western Australian Government-imposed interests or encumbrances affecting land are reflected in Property Interest Reports.

- 4.60 The SLIP is a dynamic system, and Landgate told the Committee that it is continuously identifying and adding new interests:

In fact, that number has changed since we made our submission. We are now up to about 89 interests, and they are covered in the property interest report. It is quite a dynamic area. We have been working across the sector for some years to create the property interest report and there are 89 interests at present. It is growing as Landgate, through its consultation across the sector, which is continuous, uncovers new interests.<sup>229</sup>

#### **RECOMMENDATION 13**

Landgate continue cross-sector consultation to ensure data relating to all Western Australian Government interests affecting land is included in the Shared Land Information Platform.

#### **RECOMMENDATION 14**

The Premier issue a Circular instructing Western Australian Government departments and agencies responsible for interests affecting land to share relevant data with Landgate.

- 4.61 Some other interests may be reflected on the PIR, but in a way that may be confusing or unclear to members of the public. The majority of complaints that the Committee received in this regard were about ESAs and energy operator easements, both of which have the potential to affect use and enjoyment of land (as outlined in Chapter 3).
- 4.62 For example, in relation to energy operator easements:
- Data sets from Western Power, Horizon Power and Water Corp are available through SLIP, through data.wa as a catch net. Some of those are used in a property interest report; some of them are not.<sup>230</sup>
- 4.63 One submitter who purchased a PIR, but later found an undisclosed energy operator easement to exist on the property, expressed his frustration:

The Property Report instigated by Landgate showed no sign of it in the report that we paid for and their excuse is that they cannot force any Government Agency or Corporation to reveal this information and neither did Western Power wish to make admission that it existed. So a purchaser cannot be assured under what

<sup>228</sup> Graeme Gammie, Chief Executive, Landgate, transcript of evidence, 19 February 2020, p 6.

<sup>229</sup> *ibid.*, p 2.

<sup>230</sup> Roberto Hofmann, Account Manager, Natural Resource Management and Critical Infrastructure, Landgate, transcript of evidence, 19 February 2020, p 10.

conditions and encumbrance exist on this land to make a fully informed decision of whether to buy or not.<sup>231</sup>

## RECOMMENDATION 15

The Minister for Energy instruct energy operators to work with Landgate to ensure that energy operator easements are reflected in a clear way on Property Interest Reports and in the Shared Land Information Platform maps.

- 4.64 Because a number of submitters/witnesses struggled to locate an ESA on their property through SLIP, the Committee took the opportunity to test the process during a private hearing with Landgate. The Committee used the address of an agricultural property, which it knew to have an ESA. In relation to this address, the Committee purchased every relevant document from the Landgate website, at a total cost of \$153.60.
- 4.65 The Committee notes that although Landgate advised that the purchaser would usually receive the documents by email in 10 minutes, in this case it took approximately one hour.<sup>232</sup> This was in Perth, with high-speed internet.
- 4.66 While 'Native Vegetation' is an interest listed on the PIR, an ESA is not. Presumably, a landowner or prospective purchaser who saw 'Native Vegetation' on their PIR would need to then do their own search on the DWER website to ascertain if an ESA is present.
- 4.67 DWER advised the Committee that it may be misleading to include 'ESA' in the title of the interest, as not all Native Vegetation is on an ESA. Including ESAs as an interest in the PIR will likely involve 'technical issues, costs and stakeholder engagement issues'.<sup>233</sup> The Committee finds this explanation unsatisfactory.

Figure 2. Extract from Property Interest Report

<p><b>Native Vegetation</b></p> <p><b>Responsible agency:</b> Department of Primary Industries and Regional Development</p>	<p><b>Definition of Interest:</b> Clearing of native vegetation is prohibited unless a clearing permit is granted by the Department of Primary Industries and Regional Development (DPIRD) or the clearing is for an exempt purpose.</p> <p><b>Affect of Interest:</b> The selected property or area of land <b>falls within</b> an area known to have native vegetation.</p> <p>All clearing of native vegetation requires a permit unless it is exempt. Exemptions apply for day-to-day activities that have a low environmental impact. Exemptions do not apply in areas classified as Environmentally Sensitive Areas.</p>
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[Source: Landgate, extract of Property Interest Report for property in Gingin, February 2020, p 15.]

- 4.68 The agency displayed in Figure 2 as being responsible for Native Vegetation is Department of Primary Industries and Regional Development (DPIRD). In response to a query from the Committee, DWER is liaising with Landgate to update incorrect text in the PIR.<sup>234</sup>

<sup>231</sup> Submission 7 from Terrence Ealing, 18 July 2020, p 5.

<sup>232</sup> Roberto Hofmann, Account Manager, Natural Resource Management and Critical Infrastructure, Landgate, transcript of evidence, 19 February 2020, p 3.

<sup>233</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, letter, 2 April 2020, p 1.

<sup>234</sup> *ibid.*, p 2.

4.69 After some issues loading the maps, the Committee was able to locate the ESA on the property in question using the 'Locate' online mapping function through SLIP. However, this required selecting two drop-down options from a list of layers.

4.70 In the Committee's view, an individual would need an understanding of what an ESA is and a level of computer literacy to locate an ESA in this manner. Timothy Houweling, Director of Cornerstone Legal, told the Committee that the system is becoming more accessible over time:

**Mr HOUWELING:** They pretty much put everything on there now. You can also link it up with SLIP data through Google Earth, so you can put different layers of data, bushfire-prone areas —

**The CHAIR:** But seriously, how many people have that sort of IT skill to be able to do that?

**Mr HOUWELING:** It is more and more available; there is no doubt.<sup>235</sup>

4.71 On 25 June 2020, with reference to this Inquiry, the Minister for Environment announced that ESAs would soon be added to PIRs. ESAs became the 91<sup>st</sup> interest to be included on a PIR in July 2020. As the Committee had planned to make a recommendation in this regard, the Committee supports this development.

4.72 One of the interests listed on a PIR is Environmental Protection Policies. The Committee was concerned that most members of the public might not be aware of exactly what this means. DWER advised that Environmental Protection Policies are those policies developed under Part 3 of the EP Act and approved by the Minister for Environment, including:

- Environmental Protection (Western Swamp Tortoise Habitat) Policy 2011
- Environmental Protection Goldfields Residential Areas Sulfur Dioxide Policy and Regulations 2003
- Environmental Protection (Kwinana) (Atmospheric Wastes) Policy 1999 and Regulations 1992
- Environmental Protection Peel Inlet – Harvey Estuary Policy 1992.<sup>236</sup>

4.73 In the particular example the Committee considered, 'Environmental Protection Policies' was listed as an interest that did not affect the property. The Committee is of the view that this could easily be misinterpreted by members of the public as meaning no environmental restrictions apply. In this case, of course, the property is in fact an ESA. DWER advised that:

The Department understand that there may be technical constraints in identifying how these apply to individual properties, and recommends that the Standing Committee on Public Administration seeks advice from Landgate.<sup>237</sup>

## RECOMMENDATION 16

The Minister for Environment direct the Environmental Protection Authority, in collaboration with Landgate, to list each individual Environmental Protection Policy in Property Interest Reports.

4.74 Most people are familiar with the concept of a Certificate of Title. A second issue is whether the average person is aware that PIRs act as another source of information about property interests. Landgate have promoted its availability:

<sup>235</sup> Timothy Houweling, Director, Cornerstone Legal, transcript of evidence, 18 November 2019, p 11.

<sup>236</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, letter, 2 April 2020, p 2.

<sup>237</sup> *ibid.*

Landgate has previously run advertising campaigns—radio and newspaper et cetera—to raise awareness in the early days. Primarily we rely on the online domain to promote the PIR.<sup>238</sup>

- 4.75 As at 22 February 2020, a total of 68 879 reports have been produced, including:
- 20 003 individual interest inquiries
  - 48 876 consolidated PIRs (available from 2013).<sup>239</sup>
- 4.76 Statistics on the Landgate website suggest that approximately 24 000 properties are sold in WA per year, meaning that since 2013 PIRs have been produced for 33 percent of sales.<sup>240</sup>
- 4.77 The Committee is satisfied that a PIR is easy to find—the Landgate website offers users the option to purchase a PIR when searching an address from the landing page, or through SLIP maps.
- 4.78 While the Committee is aware that not all members of the public will be aware of PIRs, it is likely that most real estate agents and settlement agents are. While some real estates may encourage prospective buyers to purchase PIRs as a matter of course, this likely depends on the individual agent:

Some real estate agents, for example, saw it as a fantastic part of due diligence to cover themselves with regard to disclosing information to prospective buyers or sellers. Some again, some of the real estate agents felt it was detrimental to their ability to sell a property because it means they had to look into more information to find out that there are 16 interests against this property and they need to go to 16 different departments and work out what they are and understand them in order to disclose more information to a prospective buyer or seller.<sup>241</sup>

- 4.79 The real estate and settlement agencies are regulated by the *Real Estate and Business Agents Act 1978* and the *Settlement Agents Act 1981*, which are administered by the Commissioner for Consumer Protection:

Under these Acts, real estate agents and settlement agents have (largely) unique Codes of Conduct; however there are some overlaps mostly in the areas of the application of an appropriate level of skill, care and diligence as well as keeping their related clients fully informed on matters that affect or have the potential to affect their interests in relation to the sale and purchasing of real estate.<sup>242</sup>

- 4.80 Rule 24 of the Real Estate and Business Agents and Sales Representatives Code of Conduct 2016 requires that real estate agents and sales representatives must make reasonable efforts to ascertain, verify and communicate material facts in relation to a sale:

#### **24. Material facts**

- (1) Prior to the execution by a client of any contract relating to the sale or lease of any real estate or business the agent or sales representative must make all reasonable efforts to ascertain or verify all facts material to the transaction (the material facts) that a prudent agent or sales representative would ascertain or verify.

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<sup>238</sup> Graeme Gammie, Chief Executive, Landgate, transcript of evidence, 19 February 2020, p 4.

<sup>239</sup> Landgate, Answer to question on notice 1 asked at hearing held 19 February 2020, dated 6 March 2020, p 1.

<sup>240</sup> Landgate. See: <https://www0.landgate.wa.gov.au/property-reports/market-trends/property-statistics/test-house-price-statistics>. Viewed 3 September 2020.

<sup>241</sup> Roberto Hofmann, Account Manager, Natural Resource Management and Critical Infrastructure, Landgate, transcript of evidence, 19 February 2020, p 3.

<sup>242</sup> Submission 63 from Department of Mines, Industry Regulation and Safety, 31 July 2019, p 2.

(2) An agent or sales representative must promptly communicate a material fact to any person who may be affected by the material fact and appears to be unaware of it.

4.81 According to the Hon Rick Mazza MLC, the fact that there is no specific definition of 'material fact' in the Code of Conduct is a problem, particularly in relation to identifying Bush Fire Prone Areas.<sup>243</sup>

4.82 However, the Department of Mines, Industry Regulation and Safety advised the Committee that:

The Commissioner has advised the real estate industry that while there is no specific definition of what constitutes a material fact, it should include the information a reasonable person would likely use when deciding whether to proceed with a particular property transaction. It follows that a reasonable person would consider the disclosure of whether a property is in a designated bushfire prone area to be a material fact, given the development implications and potential costs to them.

Consumer Protection is of the view that the code requirements already establish that an agent should check the Map of Bushfire Prone Areas, the certificate of title and also consider providing prospective buyers with a Property Interest Report as means of disclosing a range of potentially relevant issues. This includes whether a property is in a designated bushfire prone area, and what that might mean when building or developing that property. Prospective buyers can also purchase a Property Interest Report from Landgate or ask the selling agent to do so.<sup>244</sup>

#### **FINDING 15**

The Real Estate and Business Agents and Sales Representatives Code of Conduct requires that real estate agents and sales representatives ascertain, verify and communicate all material facts to a transaction, but are not specifically required to provide prospective buyers with a Property Interest Report.

#### **RECOMMENDATION 17**

The Western Australian Government amend the Real Estate and Business Agents and Sales Representatives Code of Conduct to require that real estate agents inform clients of the option to purchase a Property Interest Report in relation to a real estate transaction.

4.83 A third issue is currency. For the price of \$31.50, individuals can sign up for TitleWatch, an annual subscription service that notifies users when there has been a change to a Certificate of Title. Presently, 430 people have TitleWatch subscriptions.<sup>245</sup>

4.84 However, there is no such option for PIRs, which are fixed in time. Lorraine Finlay told the Committee that for this reason, PIRs are more useful to prospective buyers than current owners:

How often should a property owner be expected to order a PIR just to find out whether or not the government has decided to impose an encumbrance on their property? This is a critical question when the encumbrance in question creates legal obligations that operation from the time of its creation. At the very least, if an

<sup>243</sup> Submission 60 from Hon Rick Mazza MLC, p 3.

<sup>244</sup> Submission 63 from Department of Mines, Industry Regulation and Safety, 31 July 2019, p 4.

<sup>245</sup> Landgate, Answer to question on notice 6 asked at hearing held 19 February 2020, dated 6 March 2020, p 3.

interest is significant enough to be added to a PIR then this should trigger an automatic notification being sent to the owner of the property concerned.<sup>246</sup>

### **FINDING 16**

The information contained in Property Interest Reports are fixed in time, and individuals are not notified of future changes.

- 4.85 The Committee asked Landgate whether a service similar to TitleWatch could be offered in relation to PIRs. Such a service is possible from an information technology perspective, but:

Consideration would need to be given to the process requirements for Landgate and contributing agencies, likely market demand and the cost of implementing and maintaining such a service.<sup>247</sup>

### **RECOMMENDATION 18**

The Western Australian Government establish a service similar to TitleWatch to inform clients of updates to their Property Interest Report.

## **Conclusion**

- 4.86 This Chapter has outlined the mechanisms for disclosing interests affecting land, specifically Certificates of Title and PIRs. The Committee notes that the WA Government has taken positive steps since 2004 to disclose interests. In particular, Landgate's SLIP and PIRs are useful tools for prospective buyers hoping to find out how their land use may be affected by government issued encumbrances.
- 4.87 The Committee accepts that the purpose of the Torrens land title system is to provide certainty of ownership. However, failure to disclose relevant interests by any mechanism can threaten private property rights by undermining purchasing confidence. The Committee is therefore also of the view that the Torrens land title system can, and should, disclose all interests affecting property, as opposed to only the select list of interests currently included on a Certificate of Title.
- 4.88 Evidence to the Committee showed clear support for all interests and encumbrances affecting land to be displayed on a Certificate of Title.<sup>248</sup> Landowners feel that a comprehensive Certificate of Title would be the simplest and most transparent mechanism, and seek the accuracy guarantee that would attach. While the Committee agrees with this view, it also notes evidence from Landgate and the Hon Stephen Dawson MLC about the cost and complexity for landowners and conveyancers of adding additional interests to a Certificate of Title.
- 4.89 For these reasons, the Committee's recommendations in this Chapter have aimed to both:
- ensure the utility and accuracy of the PIR and SLIP, as tools for disclosing a broad range of interests in land
  - investigate the potential viability of including all interests affecting land on a Certificate off Title by assessing any potential negative consequences for landowners.

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<sup>246</sup> Submission 47 from Lorraine Finlay, 31 July 2019, p 4.

<sup>247</sup> Landgate, Answer to question on notice 7 asked at hearing held 19 February 2020, dated 6 March 2020, p 4.

<sup>248</sup> For example, Submission 6 from WAFarmers, 18 July 2019; Submission 75 from Gail and David Guthrie, 31 July 2019 and Submission 36 from Plus Your Settlements, 30 July 2019.

## CHAPTER 5

# Compensation

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### Introduction

- 5.1 Term of reference (d) required the Committee to inquire into the payment of fair and reasonable compensation where the value of a property is diminished by a government encumbrance (such as an ESA) or resumption (such as compulsory acquisition) to derive public benefit.
- 5.2 As outlined in Chapter 3, there are a number of ways that government actions can affect the use or value of private property. In some cases, landowners may be eligible for compensation under the LA Act or the *Planning and Development Act 2005* (PD Act).
- 5.3 This Chapter will outline the following concepts, which were raised through debate preceding and submissions to this Inquiry:
- injurious affection
  - compensation under the LA Act, including recommendations from past inquiries and proposed reforms
  - compensation under the PD Act, including recommendations from past inquiries and proposed reforms
  - where compensation for injurious affection is not available, including for land affected by an ESA and utility easements
  - ‘just terms’ compensation under the Australian constitution.
- 5.4 Due to the specificity of the subject matter, compensation in relation to water and fishing licences will be dealt with separately at Chapters 6, 7 and 8.

### What the Committee heard

- 5.5 The Committee heard significant support for the payment of fair and reasonable compensation to landowners where the value of a property is diminished by a government encumbrance:<sup>249</sup>

In all cases where public benefits are created by government legislation or policy decisions at the expense of private benefits, state and/or local governments as appropriate should pay compensation to the owners of private land for lost earnings arising from the decisions of government.<sup>250</sup>

- 5.6 In his submission to this Inquiry, the Hon Rick Mazza MLC said:

Governments need to take responsibility for their policies and provide adequate compensation to property owners who have had their property rights diminished.<sup>251</sup>

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<sup>249</sup> For example, see Submission 29 from Bernie Masters, 29 July 2019; Submission 23 from Wayne Gowland, 28 July 2019; Submission 47 from Lorraine Finlay, 31 July 2019 and Submission 60 from Hon Rick Mazza MLC, 31 July 2019.

<sup>250</sup> Submission 29 from Bernie Masters, 29 July 2019, p 2.

<sup>251</sup> Submission 60 from Hon Rick Mazza MLC, 31 July 2019, p 9.

- 5.7 For the most part, submitters did not dispute that there are situations in which the WA Government can rightfully acquire interests in land:

As a rural Member I continued to receive complaints from constituents on many issues, particularly clearing and the loss of property rights when public infrastructure, such as Gas pipelines and large electric power lines were installed. Land owners generally accepted the need for the installations but believed they could often be put on Crown land and if not the land owner should receive compensation from the community, as the structure was for the benefit of the community.<sup>252</sup>

- 5.8 Such acquisition of rights should be accompanied by compensation. It was submitted that in relation to certain encumbrances, current compensation frameworks are inadequate:

The key problem with the existing framework is that the State Government has been able to impose substantial restrictions on property rights, but has failed to provide compensation to the existing land owners who have been affected.<sup>253</sup>

- 5.9 Dr Garry Middle, a planning academic at Curtin University, told the Committee that where compensation is paid, the converse should also apply:

Where governments construct infrastructure and private benefits follows – for example building railway lines or upgrading areas like Scarborough and property values of the surrounding areas increases – then some of this benefit should flow back to governments and the taxpayers who funded these projects.<sup>254</sup>

## Injurious affection

### What is injurious affection?

- 5.10 The term ‘injurious affection’ is commonly used in land acquisition legislation to refer to damage suffered by landowners in respect of land retained, and particularly its depreciation in value:<sup>255</sup>

It is a neat, expressive way of describing the adverse effect of the activities of the resuming authority upon a dispossessed owner's land.<sup>256</sup>

- 5.11 For example, section 173 of the PD Act provides:

Subject to this Part any person whose land is injuriously affected by the making or amendment of a planning scheme is entitled to obtain compensation in respect of the injurious affection from the responsible authority.<sup>257</sup>

- 5.12 This is not to say that the damage has resulted from a legal ‘wrong’—according to Baron Bramwell in *McCarthy v Metropolitan Board of Works*:

What is done is rightful under the powers of the Act. It means hurtfully or "damnously" affected. As when we say of a man that fell and injured his leg. We do not mean that his leg was wronged, but that it was hurt. We mean he fell, and his leg was injured, that is to say, hurtfully affected.

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<sup>252</sup> Submission 11 from Gingin Private Property Rights Group, 24 July 2019, p 2.

<sup>253</sup> Submission 47 from Lorraine Finlay, 31 July 2020, p 5.

<sup>254</sup> Submission 20 from Dr Garry Middle, 26 July 2019, p 3.

<sup>255</sup> D Brown. ‘The differing faces of injurious affection’, *Western Australian Law Review*, 1972, vol. 10, 4, p 336.

<sup>256</sup> *Marshall v Director General, Department of Transport* [2001] HCA 37, p 19.

<sup>257</sup> *Planning and Development Act 2005* s 173(1).



At the same time, I am clearly of opinion that to entitle the parties interested to compensation, the injury or hurt must be such as a could not lawfully be inflicted except by the powers of the Act.<sup>258</sup>

5.13 There are two distinct, but related, applications of ‘injurious affection’ to land under WA law:

- the compulsory acquisition of an interest in land under the LA Act (although the term ‘injurious affection’ is not used in this Act)
- in the context of planning law under the PD Act.<sup>259</sup>

5.14 The WA Government explained in 2004:

the term “injurious affection” has been adopted in WA (and it would appear has now superseded the taking statute) to represent the concept of a diminution of value of land due to certain restrictions on the use of land arising out of the imposition of town planning rules or regulations or the compulsory taking of land.<sup>260</sup>

5.15 This Chapter deals with both applications separately.<sup>261</sup>

## Land Administration Act

5.16 The LA Act is the primary WA statute governing dealings in Crown land, and enables the Minister for Lands to sell Crown land in fee simple. It is also the primary statute providing for compulsory and voluntary land acquisition by the WA Government and other authorised bodies where land is required for public works.

5.17 Part 10 of the LA Act provides for compensation where an interest in land has been acquired.

5.18 Although the LA Act is the principal Act governing land acquisition, it interacts with a number of other Acts that may employ slightly different approaches:

there are a number of other WA statutes which involve the carrying out of works of a public character which affect the value of privately owned land, in the sense that they result in a diminution of the value of abutting land of the same owner for the benefit of the public, even though compensation entitlements vary from statute to statute and from work to work. What can be described as the reticulated infrastructure statutes, such the *Energy Operators (Powers) Act 1979 (WA)*, *Water Agencies (Powers) Act 1984 (WA)*, *Dampier to Bunbury Pipeline Act 1997 (WA)*, and *Petroleum Pipelines Act 1969 (WA)*, illustrate the different conceptual approaches adopted by the WA Parliament in balancing the importance of public infrastructure and the benefits that it brings to private owners (including a potential betterment or enhancement component in the value of their land by reason of their access to such services) against the limitations imposed by the physical presence of such works on land.

In general, the trend has been to require the agency to compulsorily acquire the fee simple or a suitable lesser interest in land under the compulsory taking statute for works of a particularly high significance and impact, but to exempt from a requirement to take an interest in land at all in respect of lesser works, such that an owner whose property is affected by the presence of works may have no

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<sup>258</sup> *McCarthy v Metropolitan Board of Works* [1874] LR 7 HL 243.

<sup>259</sup> Law Reform Commission of Western Australia, *Project 98 – compensation for injurious affection*, July 2008, p 7.

<sup>260</sup> Government of Western Australia, *Response of the Western Australian Government to the Western Australian Standing Committee on Public Administration and Finance*, 2004, p 10.

<sup>261</sup> The WALRC also discuss the meaning of the term injurious affection in the 2008 report, *Compensation for Injurious Affection*, Found here: <https://www.lrc.justice.wa.gov.au/files/P98-FR.pdf>.

entitlement to compensation at all. The approach of the statutes to the issue of compensation arising out of the impact of such works is not uniform.<sup>262</sup>

5.19 Energy operators, such as Western Power, pay compensation in accordance with legal requirements under the LA Act as read with the *Energy Operators (Powers) Act 1979* (EOP Act):

If the compensation laws are ever changed then Western Power will, of course, pay compensation in accordance with the new laws.<sup>263</sup>

5.20 The EOP Act provides that energy operators are not liable to pay compensation under the LA Act for any damage attributable to their rightfully accessing a property or performing necessary works. Furthermore:

No claim lies against an energy operator by reason of any loss of enjoyment or amenity value, or by reason of any change in the aesthetic environment, alleged to be occasioned by the placing of works of the energy operator on any land.<sup>264</sup>

### 2004 Inquiry

5.21 In 2004, the PAF Committee made several recommendations in relation to land acquisition and compensation, including that:

- a single Act be enacted to deal with all aspects of compulsory land acquisition in WA (recommendation 3)
- the broad issue of compensation for injurious affection to land in WA be referred to the WALRC for review (recommendation 12)
- all land acquiring agencies and bodies should accompany their initial offer of compensation to a landholder in a compulsory acquisition of any interest in land with an advance (recommendation 15)
- all land acquiring agencies and bodies pay the reasonable costs of independent land valuation, compensation assessment advice and legal costs to landholders for both compulsory and voluntary acquisitions (recommendations 17 and 18)
- a single, independent land acquisition agency be established to acquire all land acquisitions at a fair price on behalf on the WA Government and associated bodies (recommendation 20)
- the WA Government adopt the proposed model land acquisition procedure (recommendation 21).

5.22 The Committee recommends that readers refer to the 2004 Report for more detail and Appendix 2 for a full list of recommendations and their current implementation status.

### Implementation status

#### *Not supported*

5.23 Some recommendations were not supported by the WA Government, and continue not to be supported today. For example, the WA Government maintains that a model land acquisition

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<sup>262</sup> Government of Western Australia, *Response of the Western Australian Government to the Western Australian Standing Committee on Public Administration and Finance*, 2004, p 10.

<sup>263</sup> Submission 70 from Western Power, 31 July 2019, p 3.

<sup>264</sup> *Energy Operators (Powers) Act 1979* s 45(2).

procedure proposed by the PAF Committee at recommendation 21 is 'overly simplistic and formulaic, and not suitable in relation to compulsory acquisitions'.<sup>265</sup>

#### *Implemented without legislative change*

5.24 Some recommendations were implemented without legislative change. For example, the WA Government advised that in relation to recommendation 15, it is general practice to make an offer of advance payment of 100 percent of the offer of compensation, on the basis that the payment is not to be regarded as prejudicing the affected landholders right to continue negotiating on the final amount. The LA Act recommends 90 percent, although:

Instances may arise, however, where an offer of an advance payment of less than 90 per cent is appropriate, where additional information such as financial statements are required to compensate for other matters such as disrupted business costs.<sup>266</sup>

#### *Law Reform Commission of Western Australia*

5.25 Recommendation 12 was implemented in 2005, when the Attorney General directed the WALRC to report on the issue of compensation for injurious affection to land. As the principal Act for acquiring land in WA, the LA Act was a major focus of this project.

5.26 In particular, section 241 of the LA Act, which deals with how compensation is determined, was found to be the 'central and crucial provision' in WA for the acquisition of land. Thirteen of the WALRC recommendations related to section 241. The broad intent of the recommendations were to ensure that section 241 implements compensation for injurious affection in a clear and fair way. To date, none of those recommendations have been implemented.<sup>267</sup>

### **FINDING 17**

The Law Reform Commission of Western Australia's 2008 recommendations to amend section 241 of the *Land Administration Act 1997* have not been implemented.

#### *Land Acquisition Legislation Amendment (Compensation) Bill 2014*

5.27 In 2014, the *Land Acquisition Legislation Amendment (Compensation) Bill 2014* (LALAC Bill) was introduced into Parliament:

The Bill's purpose was to deliver a fairer and more transparent approach for the assessment and determination of compensation for landholders where private property is acquired by the State and to ensure that compensation paid for the compulsory acquisition of a part of a property is assessed not only on the value of the land taken, but also on the greater impact it has on the entire property.<sup>268</sup>

5.28 During the second reading speech, former Premier Colin Barnett said:

The legal framework that enables government to acquire interests in land, and to provide compensation when doing so, is complex and spread across a number of

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<sup>265</sup> Hon Ben Wyatt MLA, Minister for Lands, letter, 1 November 2019, p 5.

<sup>266</sup> *ibid.*, p 3.

<sup>267</sup> Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 17 February 2020, p 8.

<sup>268</sup> Hon Ben Wyatt MLA, Minister for Lands, letter, 1 November 2019, p 5.

different acts. In addition, there are inconsistencies between acts, further adding to the complexity.<sup>269</sup>

- 5.29 The LALAC Bill would have implemented 14 of the 31 recommendations made by the WALRC. The WA Government also announced at this time that it was progressing further reforms to the LA Act that would implement additional recommendations made by the WALRC.<sup>270</sup> The former Premier also tabled the Private Property Rights Charter for WA (Charter), which emphasised the principles of compensation and the use of compulsory acquisition as a last resort:

Acquisition by agreement should be attempted before privately owned land is compulsorily acquired, where this will not unduly compromise the advancement of the relevant community benefit or public interest.

Laws for the compulsory acquisition of privately owned land should provide for compensation in an amount that will, having regard to all relevant matters, justly compensate the landowner for the acquisition of the land in a manner which is fair to the community and the landowner.<sup>271</sup>

- 5.30 Murray Nixon, President of the Gingin Private Property Rights Group, told the Committee that there have been some improvements since the introduction of the Charter, which instructed agencies to place public infrastructure on Crown land, where possible.<sup>272</sup>

- 5.31 The LALAC Bill proposed to amend the following:

- LA Act
- EOP Act
- *Water Agencies (Powers) Act 1984*
- *Water Services Act 2012*.

- 5.32 Where compensation has traditionally only been available when a freehold interest in land is taken, the LALAC Bill would have enabled landholders to claim compensation for a reduction in the value of retained land when any interest is taken. This would have included lesser interests, such as easements.<sup>273</sup>

- 5.33 The LALAC Bill contained provisions specific to energy operators and water service providers, to ensure that fairer compensation can occur in these cases while keeping the costs of essential services reasonable:

These provisions will enable essential projects for the community to continue, while still providing more equitable compensation for affected landholders than is currently the case.

For example, an energy operator or water provider will not be required to pay compensation for the loss of amenity value when they are utilising existing legislative powers to enter onto land to construct or maintain works without acquiring an interest in land to do so. These powers may need to be utilised regularly or on short notice to ensure the continued supply of energy or water. In

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<sup>269</sup> Hon Colin Barnett MLA, Premier, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 November 2014, p 8992.

<sup>270</sup> *ibid.*

<sup>271</sup> Government of Western Australia, *A Private Property Rights Charter for Western Australia*, 27 November 2014, p 3.

<sup>272</sup> Submission 11 from Murray Nixon JP OAM, 19 July 2019, p 2.

<sup>273</sup> Hon Colin Barnett MLA, Premier, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 November 2014, p 8992.

these circumstances, there is minimal impact on the landholder and it is not appropriate for compensation to be provided.<sup>274</sup>

- 5.34 The LALAC Bill did not advance past the second reading stage and subsequently lapsed at the end of the 39<sup>th</sup> Parliament.

#### *Land Administration Bill*

- 5.35 The WA Government has confirmed that it is currently drafting a new Bill to amend the LA Act (proposed Land Administration Bill), which will include the LALAC amendments to the LA Act. However, when the Committee asked how the Bill will deal with determining compensation value, DPLH advised that it does not have a draft Bill for that section yet:

It would also be fair to say that, given our current priorities and partly because of machinery of government changes and where the pressure points are, it is not something we are actively working on at the moment.<sup>275</sup>

### **RECOMMENDATION 19**

The Minister for Planning ensure that the new Bill to amend the *Land Administration Act 1997* implements the Law Reform Commission of Western Australia's relevant 2008 recommendations regarding compensation for injurious affection.

#### **Water Corporation**

- 5.36 As a land acquiring agency, 11 of the recommendations of the 2004 Inquiry were relevant to the Water Corporation. Eight of these recommendations have since been implemented.<sup>276</sup>
- 5.37 The Committee did not receive specific evidence or complaints about the Water Corporation and its role as a land acquiring agency.

### **Planning and Development Act 2005**

#### **Injurious affection provisions**

- 5.38 The PD Act was enacted in 2005 to consolidate the *Town Planning and Development Act 1928*, the *Metropolitan Region Town Planning Scheme Act 1959* and the *Western Australian Planning Commission Act 1985* into one single, streamlined Act.<sup>277</sup> The PD Act establishes the WAPC and provides for local, regional and state planning schemes.
- 5.39 Injurious affection has a different, albeit related, effect under the PD Act than the LA Act, as the land is not necessarily acquired.<sup>278</sup> According to the WALRC:

In the context of a compulsory acquisition of an interest in land, the expression (as used in the *Public Works Act before 1997*) applied to a person's land other than the land acquired from that person. It referred to any reduction of the value of adjoining land of the person caused by the carrying out of, or the proposal to carry out, the public work for which the land was acquired.

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<sup>274</sup> *ibid.*, p 8993.

<sup>275</sup> Gail McGowan, Director General, Department of Planning, Lands and Heritage, transcript of evidence, 17 February 2019, p 10.

<sup>276</sup> Hon Dave Kelly MLA, Minister for Water, letter, 17 October 2019, p 2-3.

<sup>277</sup> Hon John Kobelke, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 7 April 2005, p 572.

<sup>278</sup> Law Reform Commission of Western Australia, *Project 98: compensation for injurious affection*, 2008, p 18.

In the context of planning law, however, the expression applies to the decrease in value of a person's interest in land caused by a planning scheme's application to that land. Adjoining land is not relevant.<sup>279</sup>

5.40 The WA Government said in 2004:

It is not just any planning restriction that will result in a diminution in value of land giving rise to an entitlement to compensation, but only restrictions that are attributable to a limitation on the use of private land for no purpose other than a public purpose. This occurs by means of the classification of land by "reservation" as distinct from "zoning" under a town planning scheme, region scheme or redevelopment scheme.<sup>280</sup>

5.41 Part 11, Division 2 of the PD Act provides for compensation where land is injuriously affected by a planning scheme. Section 173 provides that subject to Part 11, a person whose land is injuriously affected by the making or amendment of a planning scheme is entitled to obtain compensation in respect of the injurious affection from the responsible authority.

5.42 Section 174 establishes that land is injuriously affected by the making or amendment of a planning scheme if, and only if:

- that land is reserved (whether before or after the coming into operation of this section) under the planning scheme for a public purpose
- or
- the scheme permits development on that land for no purpose other than a public purpose
- or
- the scheme prohibits wholly or partially —
  - the continuance of any non-conforming use of that land
  - or
  - the erection, alteration or extension on the land of any building in connection with or in furtherance of, any non-conforming use of the land, which, but for that prohibition, would not have been an unlawful erection, alteration or extension under the laws of the State or the local laws of the local government within whose district the land is situated.

5.43 Either claimants or responsible authorities may apply to the State Administrative Tribunal for determination of any question as to whether land is injuriously affected. Compensation is then determined by arbitration in accordance with the *Commercial Arbitration Act 2012*, unless the parties agree on some other method of determination.

5.44 Section 177 provides that compensation cannot be paid in respect of reserved land until:

- the land is first sold following the date of the reservation
- or
- the responsible authority:
  - refuses an application made under the planning scheme for development on the land

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<sup>279</sup> *ibid*

<sup>280</sup> Government of Western Australia, *Response of the Western Australian Government to the Western Australian Standing Committee on Public Administration and Finance*, 2004, p 7.

or

- o grants development approval on the land subject to conditions that are unacceptable to the applicant.

5.45 In relation to the above, a claim for injurious affection must be made within six months.<sup>281</sup> Section 187 of the PD Act provides the option for the responsible authority to elect to acquire the affected land instead of paying compensation.

### Metropolitan Region Improvement Tax

5.46 Separate to pursuing a claim for compensation, affected landowners may enter into negotiations with the WAPC for the voluntary purchase of the reserved land.

5.47 The Metropolitan Region Improvement Tax (MRIT) is a special purpose tax used to finance the cost of providing land for roads, open spaces, parks and similar public facilities, which is payable in addition to land tax on property located in the metropolitan area.<sup>282</sup> The Metropolitan Region Improvement Fund (MRIF) is the account that holds the proceeds from the MRIT. The MRIF was set up for the primary purpose of funding land acquisition and compensation.<sup>283</sup>

Table 2. *Income from Metropolitan Region Improvement Tax*

	2018	2019
WAPC income from MRIT	\$93 326 000	\$89 784 000
MRIF	\$399 228 000	\$440 107 000

[Source: Western Australian Planning Commission, *Annual report 2018/19*, pp 54 and 58.]

5.48 In the metropolitan region, this funding is the source of land acquisition and injurious affection funding. DPLH confirmed that there is an expenditure limit on the MRIF:

Any land that is reserved under the region scheme, that fund is available to pay compensation or to purchase the land. The amount of money that we are allowed to spend each year is very carefully regulated by Treasury.<sup>284</sup>

What generally occurs is that nearly all of the Planning Commission's acquisition program is driven by landowners themselves, either approaching the commission to buy reserve land or by lodging claims for compensation.<sup>285</sup>

5.49 In 2018-19, the WAPC's land acquisition program for the whole of WA included the purchase or payment of injurious affection compensation for 56 properties, totalling 502.4 hectares at a cost of \$58.7 million.<sup>286</sup>

### What the Committee heard

5.50 As mentioned earlier in this Chapter, the Committee heard little from members of the public who were unsatisfied with the land acquisition process under the LA Act. However, it received evidence from numerous submitters who claim to have been injuriously affected by

<sup>281</sup> *Planning and Development Act 2005*, s 178.

<sup>282</sup> Government of Western Australia, Department of Finance. See: <https://www.wa.gov.au/organisation/departments-of-finance/land-tax>. Viewed 10 September 2020.

<sup>283</sup> Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 17 February 2019, p 8.

<sup>284</sup> David Caddy, Chairman, Western Australian Planning Commission, transcript of evidence, 17 February 2019, p 8.

<sup>285</sup> Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 17 February 2019, p 3.

<sup>286</sup> Western Australian Planning Commission, *Annual report 2018/19*, p 31.

planning processes. This section summarises a range of examples relating to compensation for both zoning (private use, local governments) and reservation (public use, WAPC).

- 5.51 This is in addition to the case studies provided in Chapter 3, which gave examples of how planning reservations can act as encumbrances on land—particularly where people are in ‘limbo’ due to planning reservations that are in place for decades.
- 5.52 WA Land Compensation is a valuation and real estate agency business who specialise in land compensation claims. WA Land Compensation provided several case studies, and told the Committee that their main concern was with a lack of fairness in the administration of the PD Act:

Where some private land is reserved in town planning schemes, for the purposes stated in a), and compensation is available, then these same policies etc should not be used by the Authority’s valuers, planners etc for the reason land has a diminished value. Unfortunately, it is our experience, they do. These policies have to be disregarded so fair value is determined and paid.<sup>287</sup>

- 5.53 Another submitter, who sold his family home to the WA Government following its reservation, said:

I appreciate that at times it is necessary for public purposes to take precedence over private ownership. This must be an open and fair process that reflects the power imbalance between the parties.<sup>288</sup>

#### *Case study—City of Joondalup infill*

- 5.54 In a similar vein, the Committee also heard from landowners who contend that recoding in residential areas to increase density has had a detrimental effect on their property value and use.
- 5.55 In recent years, the WA Government has pushed local governments to increase allowable density around shopping centres and transport hubs, such as train stations. The City of Joondalup’s Local Housing Strategy and Local Planning Scheme Number 3 identified 10 areas within the City as appropriate for increased density.
- 5.56 Since 2016, landowners in those Housing Opportunity Areas (HOAs) have been able to redevelop their properties to accommodate the extra density allowance.<sup>289</sup> The City of Joondalup has allocated properties in HOAs have dual density codes, meaning they are allocated two density codes—for example, R20/40.<sup>290</sup>
- 5.57 The effect of a dual density code is that landowners may only redevelop their properties at the higher density code in accordance with the Residential Development Local Planning Policy, to ensure developments result in improved streetscapes and do not unduly affect existing neighbourhood amenity.

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<sup>287</sup> Submission 10 from Western Australia Land Compensation, 23 July 2019, p 2. (a) We submit that it is becoming more evident that numerous policies, for the public’s benefit, are being layered on top of private titles without compensation rights. For example Bush Forever, rare flora and wetland classifications, development buffers, natural and built heritage, ‘reservations’ in structure plans etc.

<sup>288</sup> Submission 4 from Neville Hills, 11 July 2019, p 8.

<sup>289</sup> City of Joondalup. See: <https://www.joondalup.wa.gov.au/kb/resident/local-housing-strategy>. Viewed 23 January 2020.

<sup>290</sup> *ibid.*



Table 3. General site requirements for single houses, grouped dwellings and multiple dwellings in areas coded less than R40

R Code	Average square metres required per dwelling
R20	450 square metres
R30	300 square metres
R40	220 square metres
R60	150 square metres

[Source: Department of Planning, Lands and Heritage, *SPP 7.3 Residential design codes – Volume 1*, 2019, p 47.]

5.58 While rezoning or recoding to allow for higher density use is typically a welcome sign, in the case of parts of the City of Joondalup, landowners submit that it has resulted in unintended adverse consequences:

Previously private backyards are no longer private. Unrestricted solar access becomes shadowed. Trees disappear and the environment gets hotter because of the Urban Heat Island Effect. A previously light-filled room becomes dark, and potentially less private. Traffic and noise increases, and so on.<sup>291</sup>

5.59 The Joondalup Urban Development Association was formed because of the impact the City’s infill strategy is having on homeowners. Members of the Association believe that when infill is imposed over the top of a lower residential coding, the impact that this new development will have on adjacent property owners, and their ability to enjoy that property, should be considered.<sup>292</sup>

5.60 An Edgewater resident told the Committee that he is concerned about a recent decrease in his land value due to a planning proposal to build 14 apartments around the corner:

At a recent community meeting with the Mayor one of the residents who lives over the back fence from us raised some concern over the value of his property which he had assessed by an agent, the agent then explained that the house around the corner that was sold just over a year ago for a good price (ours, I believe) would now be marketed for \$40k less due to the development...<sup>293</sup>

5.61 Joondalup residents are seeing their suburb change rapidly, and in their view, not for the better:

If they carry on with this policy, because they are not underpinning it with any infrastructure, any traffic management, any of the basic structures that you need to underpin infill, what we are going to end up with is slums—because there is nothing to support it.<sup>294</sup>

5.62 The Joondalup Urban Development Association also feel that the consultation process was inadequate:

**The CHAIR:** Was there a public consultation process?

**Mrs THOMPSON:** This is part of the problem because the public consultation process, we believe, was inadequate because instead of writing to the landowners and stakeholders to say, “This is what is happening”, they put a small-space ad into the newspaper that we were not receiving in our area. So, basically, nobody saw it,

<sup>291</sup> Submission 41 from Andy Murphy, 30 July 2019, p 1.

<sup>292</sup> Submission 43 from Joondalup Urban Development Association, 30 July 2019, p 3.

<sup>293</sup> Submission 80 from Michael Dighton, 31 July 2019, p 1.

<sup>294</sup> Suzanne Thompson, Vice President, Joondalup Urban Development Association, transcript of evidence, 16 October 2019, p 9.

and if they had have seen it, it did not mention R40, did not mention R60, and it did not mention specific suburbs.<sup>295</sup>

5.63 The City of Joondalup is aware of these concerns:

changes made to the State Government's Residential Design Codes to remove average site areas for multiple dwellings and a lack of State Government support for a City of Joondalup initiative to restrict the development of multiple dwellings to sites 2,000 square metres or larger, have resulted in development outcomes in the Housing Opportunity Areas that were not originally envisaged by the City.

Some residents are also concerned about the type of development currently occurring in Housing Opportunity Areas and called on the City to review how infill development is managed.<sup>296</sup>

5.64 According to its website, the City responded to these concerns by developing the draft new development standards for HOAs.<sup>297</sup> The new standards include restrictions on the number of apartments that can be built in certain areas, new standards for trees and landscaping, and other development standards that aim to better manage the impact of infill development.<sup>298</sup>

5.65 Although the standards will guide better future development, for some areas, the damage has already been done. The Association submit that compensation should be payable in the same way that compensation is payable when land is acquired by government for a public purpose:

When Government seeks to acquire large areas of land for public purposes as part of a greater good, it usually does so by paying recompense to the land owners. Re-coding should be no different.

Any recoding will clearly adjust land values and although that will often (as has been the case historically) reflect increased values, where recoding results in a loss of value, some kind of compensation should be paid to those who have the value of their property right diminished through no fault of their own.<sup>299</sup>

5.66 The Committee raised with WAPC that submitters contend that the increased density has adversely affected property values. The WAPC responded that this is a matter of amenity. While changes to amenity are taken into account when considering whether to approve development under a planning scheme, there is no injurious affection compensation available in relation to lost or altered amenity:

The tests is where you can use your property for no purpose other than a public purpose, in which case, that is when you are entitled to compensation. Change to amenity et cetera does not involve any acquisition of land or it being used only in accordance with a public purpose.<sup>300</sup>

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<sup>295</sup> *ibid.*, p 10.

<sup>296</sup> City of Joondalup. See: <https://www.joondalup.wa.gov.au/kb/resident/hoa>. Viewed 13 February 2020.

<sup>297</sup> *ibid.*

<sup>298</sup> City of Joondalup. See: <https://www.joondalup.wa.gov.au/community-consultation-for-draft-new-development-standards-for-housing-opportunity-areas?nocache=true>. Viewed 10 September 2020.

<sup>299</sup> Submission 43 from Joondalup Urban Development Association, 30 July 2019, p 5.

<sup>300</sup> Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 17 February 2020, p 6.

- 5.67 This view appears to align with section 174 of the PD Act, which outlines when compensation for injurious affection under the PD Act turns on a change in land use, rather than change in land value.<sup>301</sup>

*Case study—reservation preventing business improvements, the Vaz family*

- 5.68 Melwyn Vaz and his family have owned and operated a service station and roadhouse, along with a residence, on land in Yanchep since 1987. In the early 1990s, a freeway reservation was placed over the land:

They may not even need it in 50 years' time because there may not even be a freeway—it could be a highway; it could be anything—but at that time, they needed that space.<sup>302</sup>

- 5.69 Mr Vaz's situation differs from the other case studies included in this Report, as the reservation had a commercial impact. Mr Vaz points out that the business has needed to expand and evolve over the years to remain profitable, but has not been able to due to the reservation:

Many tradespeople and other heavy users of fuel were now using LPG.

Because we didn't have LPG available at the Service Station we missed out on their business, which was very profitable due to the frequency of them coming into the shop and buying the many other things that Tradespeople and workers consumed daily, as well as refuelling their vehicles. These products have a high profit margin and so just for those customer losses alone, for over 20 years, meant a massive loss of profit to the family.

This reduced our ability to grow the business, employ more people, pay more tax and get a decent wage for working for 14 hours a day, 7 days a week.

The inability to rebuild the Service Station into a more modern building meant that we have to operate out of the original building that was built in the late 1960's and slightly modified over the following years.

The original building contained asbestos and was small and meant that the site was unable to be used to it's full potential.<sup>303</sup>

- 5.70 This has left the family unable to compete with new service stations in the area, and losing money on a daily basis.<sup>304</sup> Because of these commercial impacts, the amount of compensation offered was insufficient:

the amount that the government offered wouldn't have even bought new pumps an tanks, let alone buy a new block of land [to] build a whole new Service Station and compensate for the loss of business.<sup>305</sup>

- 5.71 Land is valued at the time of purchase or compensation, taking current zoning into account and disregarding the reservation. However, the WAPC confirmed that when it purchases property by negotiation, it does not necessarily pay for a business.<sup>306</sup>

- 5.72 In this case, the reservation's impact on land use has had significant commercial and financial implications for the Vaz family. Mr Vaz told the Committee that as a result of the reservation,

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<sup>301</sup> *Planning and Development Act 2005* s 174(1)(c).

<sup>302</sup> Melwyn Vaz, Director, GOA Investments Pty Ltd, transcript of evidence, 30 October 2019, p 2.

<sup>303</sup> Submission 46 from Melwyn Vaz, 30 July 2019, p 3.

<sup>304</sup> *ibid.*, p 4.

<sup>305</sup> *ibid.*, p 2.

<sup>306</sup> Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 20 May 2020, p 2.

he has been unable to make improvements to the business, making it difficult to plan for the future and to meet changing consumer expectations.

- 5.73 The WAPC informed the Committee that it can only purchase or compensate for the land, not the business losses that the family claims to have suffered over the past 20 years. This is where Mr Vaz contends that change is required:

We feel that the system needs to become fairer and take into account the hugely detrimental affect that forced encumbrance has on private commercial properties that have very successful businesses on them and compensate them suitably, on just terms.<sup>307</sup>

- 5.74 Although the WAPC cannot compensate for business losses, the Committee heard that the WAPC has recently granted planning approvals for service station upgrades where the reserved land is unlikely to be required for 10 or more years.<sup>308</sup>

One of them was a complete rebuild of a service station in the metropolitan area on Toodyay Road, which involved even the conversion of part of it into the modern-day shops that they have, a whole new canopy, new pumps, all of those things. It was not just a moderate or minor improvement—this was a significant upgrade.<sup>309</sup>

- 5.75 Mr Vaz told the Committee that an attempt in the early 2000s to install a small concrete footing in order to add an Autogas cylinder (to service the growing demand for liquid petroleum gas) was denied.<sup>310</sup> Even if Mr Vaz had been granted approval to make upgrades, the reservation would impact his confidence to invest money in development. This is also relevant to lending institutions—the Committee questions why a bank would finance major upgrades when there is no clarity about when the land will be acquired to build the freeway.

- 5.76 The Committee notes with concern that by limiting compensation to the land only, the WAPC avoids compensating the landowner for their investment in and loss of the business operating on the land. This loss could be considerable, especially if the business and ‘good will’ in the business cannot be sold separately or the business cannot easily be relocated to another location. The Committee is of the view that this does not amount to fair compensation for the landowners’ loss.

- 5.77 Unfortunately, significant improvements are no longer an option for the Vaz family. In December 2019, the service station burned down in the Yanchep bushfires.<sup>311</sup> The WAPC anticipates that the Vaz family will approach the WAPC to purchase the property, and has set funding aside for this purpose. The final purchase price will depend on any insurance settlement or WA Government assistance provided to the family.<sup>312</sup>

#### *Case study—the Caruso family*

- 5.78 The Committee heard from Sandra Dennett, who submitted on behalf of her parents, Vincenzo and Isoletta Caruso. The Caruso family purchased a 53 hectare property in 1989,

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<sup>307</sup> Submission 46 from Melwyn Vaz, 30 July 2019, p 4.

<sup>308</sup> Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 20 May 2020, p 6.

<sup>309</sup> Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 20 May 2020, p 7.

<sup>310</sup> Submission 46 from Melwyn Vaz, 30 July 2019, p 3.

<sup>311</sup> Anita McInnes, ‘Burnt out service station targeted by thieves and the curious’, *Yanchep News Online*, 8 January 2020.

<sup>312</sup> David Caddy, Chairman, Western Australian Planning Commission, transcript of evidence, 20 May 2020, p 3.

with the intention of keeping a small section for the family and developing and selling the rest. These plans were soon halted:

By 1990 he was told to stop clearing and to stop working on his property as the State Government had intention to purchasing the block from him. At this stage the land would likely have been identified for future urban. Vincenzo did the right thing and stopped all work on his land.

During this time there were various offers from private investors to purchase the land but he could not accept any offers as he had to wait for the WAPC.

While he waited he put [his] plans on hold and no longer worked in his beloved vegetable patch and no longer tendered to his fruit trees.

Part of the block became reserved as part of the 1994 Wungong Water Strategy then in 2010 the balance of the land became reserved. The consequence was that the land was now reserved. The Caruso family has been paying land tax and council rates on the property as well as fighting [an] expensive losing battle to keep it maintained and clear of rubbish at their expense for the past 20 plus years.<sup>313</sup>

- 5.79 The lot remains reserved under the Metropolitan Region Scheme, and is subject to a Bush Forever designation. The Caruso family have struggled to manage the land, which is now subject to significant environmental requirements. The amount of compensation offered was said to be inadequate:

Over the last two decades Vincenzo and his family have been fighting to receive fair compensation and it has taken it's toll on his health and that of his wife. The WAPC had initially made [an] offer of \$400,000 which the family rejected as it was a ridiculous offer when compared to neighboring properties which sold for many many millions of dollars and all of which were promptly cleared of any vegetation and developed for housing. There was no environmental studies done over our land before it was reserved, nevertheless it was reserved to fit with the Jandakot Regional Park.

After hundreds of thousands of dollars in lawyers and Arbitration fees Vincenzo received some compensation for the small area he had cleared. The rest of the property was valued at \$0 and yet he still pays land taxes and council rates to this day awaiting the WAPC to make another unfair offer of payment. The distress continues to take it's toll on the health of Mr and Mrs Caruso who are both 82. Mr Caruso now battles cancer.<sup>314</sup>

- 5.80 DPLH advise that a compensation payment has already been made in respect of the portion of the property highlighted in green in Figure 3. No compensation has been paid in respect of the balance of the property, and the entire property is still owned by the Caruso family.<sup>315</sup>

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<sup>313</sup> Submission 78 from Sandra Dennett, 31 July 2019, p 1.

<sup>314</sup> *ibid.*, p 2.

<sup>315</sup> Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 20 May 2020, p 4.

Figure 3. Portion of Caruso property compensated for



[Source: Tabled by Western Australian Planning Commission during hearing held 20 May 2020.]

5.81 In May 2019, the WAPC wrote to the Caruso family and the owners of an adjoining property about reopening negotiations for purchase. These are the last two properties required for the Anstey-Keane wetlands within the Jandakot Regional Park.<sup>316</sup>

5.82 Due to negotiation delays and the continued deterioration of the property, in March 2020 the WAPC resolved to proceed with the compulsory acquisition of the two properties. The Minister for Planning has approved the compulsory acquisition.<sup>317</sup> Chief Property Officer Timothy Hillyard contends that compulsory acquisition rather than negotiation will 'certainly not be a financial disadvantage to either landowner':<sup>318</sup>

**The CHAIR:** Is the price that is likely to be paid to the Carusos different under compulsory acquisition as compared to a negotiated settlement?

**Mr HILLYARD...** It would certainly be a greater amount, although when we approached both the owners in this case we offered to negotiate to purchase the land on the basis that it was the equivalent of a taking, so we would include a solatium and those sorts of matters. So it is a taking by agreement, if you like.<sup>319</sup>

#### *Case study - fully allocated land acquisition budget*

5.83 The Committee heard from Ivan Yujnovich, who owns a block of land which is reserved under the Metropolitan Region Scheme. Mr Yujnovich has requested the voluntary purchase of his land from the WAPC. On request, he was advised that the purchase could not occur that year as funds for land acquisition were already fully allocated:

<sup>316</sup> Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 20 May 2020, p 3.

<sup>317</sup> Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, email, 12 June 2020.

<sup>318</sup> Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 2 May 2020, p 4.

<sup>319</sup> *ibid.*

The 2019/20 land acquisition budget, to be approved by the WAPC next month, is currently fully committed, so the WAPC is unable to enter into voluntary negotiations to purchase the reserved portion of your property. You may, however, approach the WAPC later this year to request consideration of a voluntary purchase and subject to priorities and funds being able to be identified, the WAPC could enter into negotiations at that time.<sup>320</sup>

5.84 The Minister for Planning advised the Committee that the WAPC remains willing to commence voluntary negotiations in relation to Mr Yujnovich’s reserved land, has the purchase in its acquisition program, and awaits further contact from the affected party.<sup>321</sup>

5.85 The Committee questions why the WAPC cannot initiate this contact. Chief Property Officer Tim Hillyard advised:

it is really up to Mr Yujnovich to approach the commission when he wants to recommence these negotiations. Obviously, if we got to a point where it was necessary to construct the road, then we would start talking to him—shall we say, the commission would initiate those discussions leading towards compulsory acquisition—but it is important that a landowner does not feel compelled to sell the reserve land if the timing is not right for them.<sup>322</sup>

5.86 The Committee questioned whether there is anything to prevent such purchases being pushed back year after year on the basis of a fully allocated acquisition program. David Caddy, Chairman of the WAPC, responded that the WAPC is always open to landowners coming back to renegotiate or to reopen negotiations.<sup>323</sup>

5.87 The Committee notes that the MRIT is collected to provide funds for such purposes, and in 2019 there was \$440 million in the MRIF, yet only \$89 784 000 (see Table 2, page 83) was allocated to the WAPC for land acquisition.<sup>324</sup> The Committee does not accept that landowners should be financially impacted due to artificial restraints placed on funds for land acquisition in any particular year, if there are available funds in the MRIF.

## RECOMMENDATION 20

Where funds are available in the Metropolitan Region Improvement Fund, and landowners seek acquisition of their reserved land, the Western Australian Government make additional funds available from the Metropolitan Region Improvement Fund to the Western Australian Planning Commission to facilitate the immediate purchase of the land.

### The 2004 Inquiry

5.88 The 2004 Inquiry related mainly to acquisitions, and was primarily concerned with the LA Act. In addition, the PD Act was not yet in force in 2004. Relevant processes were mostly included in the former *Metropolitan Region Town Planning Scheme Act 1959*. However, several of the PAF Committee’s recommendations are relevant.

5.89 At the time, stakeholders were calling for the introduction of statutory timeframes on the rezoning process, to avoid situations where residents were left in ‘limbo’ about the future of their area for decades.

<sup>320</sup> Submission 5 from Ivan Yujnovich, 16 July 2020, p 9.

<sup>321</sup> Hon Rita Saffioti MLA, Minister for Planning, letter, 22 October 2019, p 7.

<sup>322</sup> Timothy Hillyard, Chief Property Officer, Department of Planning, Lands and Heritage, transcript of evidence, 20 May 2020, p 5.

<sup>323</sup> David Caddy, Chairman, Western Australian Planning Commission, transcript of evidence, 20 May 2020, p 5.

<sup>324</sup> Western Australian Planning Commission, *Annual report 2018/19*, pp 54 and 58.

- 5.90 Some of the relevant recommendations of the PAF Committee included that:
- where private land is required for a public purpose which will alter the existing granted land use (as distinguished from anticipated land use) on that private land, the Crown should either compensate fairly for the downgrading of the permissible land use or acquire the property outright (recommendation 26)
  - the WA Government undertake a review of both the administrative process of the WAPC and existing statutory timeframes within planning legislation in order to address the decline in the percentage of planning applications processed within statutory timeframes (recommendation 29)
  - the WA Government review those provisions of the planning legislation relating to the resolution of inconsistencies between local and regional planning schemes so as to establish whether additional/alternative statutory time frames are required to ensure that inconsistencies are resolved in the shortest possible time (recommendation 31)
  - all landholders affected by a proposed reservation or zoning change under a draft region scheme should be contacted in person by the Department for Planning and Infrastructure, and provided with copies of all relevant documentation free of charge (recommendation 32)
  - the LA Act and relevant planning legislation be amended to provide that an acquisition of land by the State or local government following a claim for injurious affection under the planning legislation, is to be treated on the same terms and conditions as a compulsory acquisition of land under Parts 9 and 10 of the LA Act (recommendation 33)
  - the Department of Land Information maintains a comprehensive and publicly available list of all policies, strategies and plans which impact on administrative decision-making pertaining to land use (recommendation 34).
- 5.91 For a full list of recommendations with the corresponding initial and current Government responses, see Appendix 2.

### Implementation

- 5.92 The Minister for Planning advised the Committee that recommendations 26, 29, 31, 32 and 34 have been implemented, either through the enactment of the PD Act in 2005 or through the several rounds of planning reform that followed.<sup>325</sup>
- 5.93 The Minister for Planning advised that the enactment of the PD Act has made claiming injurious affection compensation more practicable:
- Prior to April 2006 when the *Planning and Development Act 2005* came into operation, injurious affection claims were seldom lodged due to the time limit of 6 months and likely the additional requirements under s.12(2a)(b)(i) of the *Town Planning and Development Act 1928*.<sup>326</sup>
- 5.94 Statutory timeframes were addressed by the Planning and Development Local Planning Schemes Regulations 2015 (LPS Regulations), as part of the Planning Reform Agenda:
- Among other things, the LPS Regulations introduced three categories of Local Planning Schemes amendments being, basic standard and complex. The categorisation allows for simpler Scheme Amendment proposals to be dealt with more quickly as they are subject to a shorter assessment period.

<sup>325</sup> Hon Rita Saffioti MLA, Minister for Planning, letter, 22 October 2019, pp 11-4.

<sup>326</sup> *ibid.*, p 11.



The LPS Regulations also introduced maximum timeframes in which the WAPC is to provide a recommendation to the Minister for Planning with respect to Local Planning Schemes and Local Planning Scheme Amendments. Prior to the introduction of the LPS Regulations, there was no regulated timeframe in which the WAPC was to provide such a recommendation.<sup>327</sup>

- 5.95 Planning reforms continue, and the new Action Plan for Planning Reform proposes more streamlined assessment processes and shorter statutory timeframes for basic applications.
- 5.96 While the WA Government supported recommendation 33 in principle, it noted that a claim for injurious affection under the PD Act cannot be treated under the same terms as the LA Act, as it does not equate to compulsory acquisition. The Minister for Planning advised that this would result in a significant financial burden to the State.<sup>328</sup> Based on this correspondence, and despite its in-principle support, it appears that the WA Government does not intend to implement this recommendation.

### **Law Reform Commission of Western Australia**

- 5.97 In 2008, the WALRC made 8 recommendations to amend the PD Act as part of its project on compensation for injurious affection, including that:
- section 176 and 184(4) of the PD Act (see Appendix 9) be amended to accord jurisdiction to the State Administrative Tribunal in respect of compensation (recommendation 17)
  - if land is reserved, section 179 of the PD Act (see Appendix 9) provide that the compensation payable to the owner includes both the reduction of the value of the reserved land and the reduction of the value of adjoining land owned by the applicant (however, if adjoining land value is increased, the increase is to be offset against the amount of compensation that would otherwise be payable) (recommendation 18)
  - section 192(1)(b) of the PD Act be amended to make clear that the value of land is to be assessed without regard to any increase or decrease in value attributable to the operation or effect of the planning scheme, or a proposal to implement the planning scheme (recommendation 22).
- 5.98 None of the recommended amendments have been implemented in the 12 intervening years.

### **FINDING 18**

Recommendations made by the Law Reform Commission of Western Australia in 2008 to amend the *Planning and Development Act 2005* have not yet been implemented.

- 5.99 Glen McLeod, firm principal of Glen McLeod Legal, has over 40 years of experience representing clients who have made claims for public purpose reservations under Part 11 of the PD Act. He told the Committee that recommendation 17 of the WALRC, that compensation and valuation matters be determined by the State Administrative Tribunal, was 'low-hanging fruit' which is long overdue for implementation:

At the moment, they are determined by arbitration. There is no sound reason for putting parties to the expense of a private arbitration when there exists an expert Tribunal having the requisite expertise to deal with such matters.

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<sup>327</sup> *ibid.*

<sup>328</sup> *ibid.*, p 13.

My short comment is that the use of arbitration is expensive, which gives the state an advantage, and it is secretive. It works against transparency and the building up of a bank of precedents containing relevant principles.<sup>329</sup>

5.100 The WAPC supports recommendation 17 of the WALRC:

It has been the view of the WAPC for many years, probably at least 10, that all compensation matters should go to the State Administrative Tribunal, and matters only be considered on appeal, if you like, to the Supreme Court on questions of law. There were submissions made to the review of the SAT act, and it is a matter that is also involved in the review of the Planning and Development Act on its fifth-year review. That is a matter that is under consideration, as are the other recommendations from the Law Reform Commission.<sup>330</sup>

5.101 The Committee expresses its disappointment that despite support for the WALRC recommendation 17, no progress has been made in the intervening 12 years for its implementation.

5.102 Mr McLeod also supports recommendation 18, that section 179 of the PD Act provide that the compensation payable to the owner includes the reduction of the value of both the reserved land and the adjoining land owned by the applicant.

5.103 While not yet legislated, WAPC advise that the current legislative review of the PD Act will consider both recommendations.<sup>331</sup>

## RECOMMENDATION 21

The Minister for Planning progress amendments to the *Planning and Development Act 2005* recommended by the Law Reform Commission of Western Australia in 2008.

### The 'good faith' hurdle

5.104 Section 177(3) of the PD Act provides that the Arbitrator, in determining compensation, must be satisfied that the sale or development application that triggered the claim took place, or was made, in 'good faith'. Glen McLeod Legal submit that this requires reform:

This is a problematic requirement in our experience. If a landowner suffers detriment because of a reservation, which is probably always the case, then there should be no added 'good faith' requirement which is in effect an unjustified impediment to making a claim.<sup>332</sup>

5.105 WAPC advised the Committee that the purpose of the good faith requirement is to determine whether:

the application that was made in order to trigger a claim for compensation was something that the person was actually going to do, not just some fanciful proposal to trigger a claim and that they have not really suffered any injury because it was a fanciful proposal, if you like. It just makes sure that people are doing things in an orderly and proper way.<sup>333</sup>

<sup>329</sup> Submission 73B from Glen McLeod Legal, 31 July 2019, p 1.

<sup>330</sup> Timothy Hillyard, Chief Property Officer, Department of Planning, Land and Heritage, transcript of evidence, 17 February 2020, p 7.

<sup>331</sup> *ibid.*

<sup>332</sup> Submission 73B from Glen McLeod Legal, 31 July 2019, p 2.

<sup>333</sup> Timothy Hillyard, Chief Property Officer, Department of Planning, Land and Heritage, transcript of evidence, 17 February 2020, p 11.

- 5.106 The Committee heard from a landowner who claims to have been adversely affected by the good faith requirement. Robert White and his family have owned land in Kwinana since the 1940s. Approximately 40 hectares of the property was designated as a Bush Forever site in 2010, precluding it from clearing.<sup>334</sup>
- 5.107 Mr White submitted that when he applied for compensation, the WAPC claimed the application was not made in good faith. It appears that this was based on the fact that the land had not been cleared before that point, although Mr White points out:
- Our land has a huge resource of yellow building sand, some of the neighbouring properties have mined yellow sand up to the northern boundary of our land. Yet the WAPC argues that the development band which the bush forever restriction placed over our land has made no difference to the value of our asset.<sup>335</sup>
- 5.108 A representative of DPLH told the Committee that in this case, no compensation was payable. However, the WAPC told the Committee that it has offered to purchase the land, and is awaiting a response from the landowners.<sup>336</sup> The landowner subsequently told the Committee that he has not heard from the WAPC in this regard.<sup>337</sup>

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<sup>334</sup> Submission 34 from Robert White, 30 July 2019, p 1.

<sup>335</sup> *ibid.*, p 2.

<sup>336</sup> Timothy Hillyard, Chief Property Officer, Department of Planning, Land and Heritage, transcript of evidence, 1 February 2020, p 11.

<sup>337</sup> Robert White, private citizen, email, 16 June 2020.

5.109 According to Mr McLeod:

If the landowner suffers detriment because of a reservation, which is probably always the case, then there should be no added good faith requirement to make an application to simply access your rights to compensation.

Of course, it is a requirement that could be waived by the government agencies—the WAPC in particular—but they never do. They always require, in my recent experience anyway, that the claimant who is seeking compensation show good faith, which is just another procedural hurdle that the unfortunate claimant has to overcome.<sup>338</sup>

5.110 The WALRC also commented on the good faith requirement in 2008:

it was suggested in a submission to the Commission, some land owners are both unable to sell reserved land and unable to make a development application in good faith, and are thereby deprived of any avenue for compensation.<sup>339</sup>

5.111 The WALRC noted that the overriding purpose of the compensation provisions is to delay payment of compensation until the land is needed, or the owner is ‘distinctly disadvantaged’. The Committee takes ‘distinctly disadvantaged’ to mean that as a result of the reservation, the owner is unable to use the land in accordance with his or her rights and entitlements applicable to the land before the reservation was imposed, or is unable to sell the land. While the WALRC considered that allowing artificial applications would thwart this purpose, it recommended an amendment to the PD Act to provide relief in hardship cases.

5.112 The Committee is of the view that an amendment to the PD Act should be considered to ensure the good faith requirement does not unreasonably deprive the landowner of any avenue for compensation.

## RECOMMENDATION 22

The Minister for Planning introduce a Bill in the Parliament of Western Australia to ensure the ‘good faith’ requirement does not unreasonably deprive a landowner of any avenue for compensation.

### Unexecuted claims

5.113 The Committee heard that the PD Act should be amended in light of the High Court’s 2017 decision in *WAPC v Southregal Pty Ltd* and *WAPC v Leith*.<sup>340</sup>

5.114 Mr McLeod told the Committee that for many years, the convention in WA was that an unexecuted compensation claim regarding reserved land could be passed onto a subsequent owner.<sup>341</sup> If the owner of the land at the time of its reservation did not claim compensation, a subsequent owner of the land could claim compensation. The argument behind this is that the right to claim compensation runs with the land.

5.115 In 2004, the High Court cast doubt over this longstanding practice by overruling the WA Court of Appeal in the case of *WAPC v Temwood Holdings Pty Ltd*.<sup>342</sup> An issue in question was whether the statutory right to compensation passed with the land. Two High Court

<sup>338</sup> Glen McLeod, Principal, Glen McLeod Legal, transcript of evidence, 18 November 2019, p 3.

<sup>339</sup> Law Reform Commission of Western Australia, *Compensation for injurious affection*, 2008, p 47.

<sup>340</sup> *Western Australian Planning Commission v Southregal Pty Ltd, Western Australian Planning Commission v Leith* [2017] HCA 7.

<sup>341</sup> Submission 73B from Glen McLeod Legal, 31 July 2019, p 2.

<sup>342</sup> *Western Australian Planning Commission v Temwood Holdings Pty Ltd* [2004] HCA 63.

judges thought that a subsequent owner did not have a right to compensation. Two other judges held the opposite view, and a fifth judge did not address the issue.<sup>343</sup>

- 5.116 The entitlement of a subsequent owner to compensation in WA has been unclear since 2004.<sup>344</sup> Interestingly, the WA Government did not introduce legislation to clarify the law following the High Court decision in *Temwood*.
- 5.117 In 2017, the High Court confirmed that subsequent owners cannot claim, even where no claim was executed, in the cases of *WAPC v Southregal Pty Ltd* and *WAPC v Leith*.
- 5.118 Southregal and Leith claimed compensation for injurious affection under the PD Act after both lodged development applications that were rejected by the WAPC. Their respective parcels of land were subject to a reservation for regional open space under the Peel Region Scheme which came into effect in March 2003.<sup>345</sup>
- 5.119 Southregal purchased its land in October 2003 for \$2.6 million and claimed compensation of \$51.6 million. Leith purchased its land in October 2003 for \$1.28 million and claimed compensation of \$20 million.<sup>346</sup> The WAPC rejected the claims for compensation on the grounds that compensation was only payable to the owners of the land at the time of reservation.<sup>347</sup>
- 5.120 In 2017, the High Court confirmed that subsequent owners cannot claim, even where no claim was executed, in the cases of *WAPC v Southregal Pty Ltd* and *WAPC v Leith*.
- 5.121 Both applied to the Supreme Court, where it was found that both were entitled to compensation. The WAPC appealed the decision in the High Court, which set aside the decision of the WA Court of Appeal in a 4:1 decision.<sup>348</sup>
- 5.122 Kiefel and Bell JJ reasoned:
- No reference is made in s 173(1) to a person who purchases land which is already affected by a reservation. It does not suggest that anyone but a landowner at the time of reservation will be entitled to compensation.
- A purchaser does not fall within the description of a person whose land is affected "by the making" of a planning scheme. A purchaser would only be entitled to compensation if there was, subsequent to that person becoming the owner, an amendment of the planning scheme which injuriously affected the purchaser's land.<sup>349</sup>
- 5.123 In brief, the High Court held:
- A subsequent purchaser does not fall within the description of a person whose land is affected 'by the making' of a planning scheme<sup>350</sup>

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<sup>343</sup> *Western Australian Planning Commission v Southregal Pty Ltd, Western Australian Planning Commission v Leith* [2017] HCA 7, 8 February 2017, p 4.

<sup>344</sup> Casteldine Gregory Law & Mediation. See: <https://cglawmediation.com.au/2017/02/high-court-rules-that-purchaser-of-land-not-entitled-to-compensation-for-land-injurious-affected-by-planning-scheme/>. Viewed 3 September 2020.

<sup>345</sup> *Western Australian Planning Commission v Southregal Pty Ltd, Western Australian Planning Commission v Leith* [2017] HCA 7, 8 February 2017, p 36.

<sup>346</sup> *ibid.*, p 13.

<sup>347</sup> *ibid.*, p 1.

<sup>348</sup> *ibid.*

<sup>349</sup> *ibid.*, p 7.

<sup>350</sup> *ibid.*, p 10.

- Purchasers are aware of the planning scheme provisions at the time of purchase, and are therefore not at the same disadvantage as the original owner<sup>351</sup>
- Compensation for the value reducing effect of the reservation would have been available to the previous owner at the point of sale (as this was the trigger event for a claim of compensation, not the subsequent purchaser's rejected development application).<sup>352</sup>

5.124 Glen McLeod Legal contend that law reform is required in light of *Southregal*, to restore the former practice in WA of allowing entitlement to claim compensation in respect of reserved land to transfer to the subsequent owner. Mr McLeod used the example of clients who may not have had the wherewithal to pursue a compensation claim, such as elderly clients who simply wish to sell their properties and move on to the next stage in life:

**The CHAIR:** But surely the subsequent owner would have been aware of any impediment on that title and therefore would have known that at the time they made the purchase, and that would have affected the purchase price, or at least they should have known about it if they had applied due diligence?

**Mr McLEOD:** Yes, that is true. Again, I think there are two points there. One is—this is a limited point, really—that before the High Court decisions, some purchases were made on the assumption that you could claim compensation, so those people lose out. Now, everyone should be aware of it. So that is a fair point.

....

My main point is that I cannot see why the onus should be on the owner at the time that the reservation is made to make a claim. There is no good reason why, if a reservation is applied to your land, and the reservation is there forever, that the right to claim compensation cannot run with the land, in the same way that planning approval rights run with land and so on. These are rather significant property-related issues that affect the value of land, and to deny someone the right of compensation or the flexibility to transfer the compensation in all sorts of different circumstances is a technicality that we can do without.<sup>353</sup>

5.125 With reference to the second reading speech on the *Metropolitan Region Town Planning Scheme Act Amendment Act 1968*, Keifel and Bell JJ observed that a purchaser of land that is subject to reservation may be expected to adjust the purchase price accordingly, and therefore obtain the land at a lower price and avoid the loss the statute predicts the original owner will suffer.<sup>354</sup> Therefore, compensation is payable to the person who owns the land at the time of the reservation, and not a buyer of injuriously affected land.

5.126 Understandably, the High Court decision would be of particular concern to landowners who have purchased land affected by a reservation on the assumption that they would be able to seek compensation for injurious affection caused by the reservation. However, as observed by Keifel and Bell JJ, it is likely that the purchase price reflected the market value of the land as a result of the reservation. The onus is on the purchaser to undertake due diligence.

5.127 The Committee asked the WAPC if there were any plans to amend the PD Act in light of the *Southregal* decision. A representative of DPLH advised that there are not, as the decision reflects the original intention of the legislation:

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<sup>351</sup> *ibid.*, p 12.

<sup>352</sup> *ibid.*, p 34.

<sup>353</sup> Glen McLeod, Principal, Glen McLeod Legal, transcript of evidence, 18 November 2019, p 6.

<sup>354</sup> *Western Australian Planning Commission v Southregal Pty Ltd, Western Australian Planning Commission v Leith* [2017] HCA 7, 8 February 2017, p 12.

So the intent is that if you are the first affected landowner, you are entitled to lodge a claim for compensation. If you choose not to because you would get a fair price in the market, in any event—the reservation did not impact upon you—then the rights to claim compensation fall away.

However, that does not stop then—the same as we normally operate through the year—a landowner affected by a reservation coming to the commission and saying, “I’ve got this reservation on my property. Would you buy it?” Yes, the commission would buy it. Or, equally, that never happens, but along comes Main Roads when they are ready to build the road and then if the landowner does not wish to negotiate the release of the property that is required, then it is compulsorily acquired, and the processes go through there.

I think the issue that came through that decision was that we should always compensate the first affected person and then the market is informed, and compensation and all negotiations go upon people being fully aware of all of the issues that are ongoing.<sup>355</sup>

- 5.128 The High Court decision in *Southregal and Leith* has largely settled the law in WA on this matter after years of uncertainty. The Committee notes, however, that it remains unclear if compensation can be claimed in respect of a development application by a subsequent owner who obtained title through inheritance.

### RECOMMENDATION 23

The Minister for Planning bring a Bill before the Parliament of Western Australia to amend the *Planning and Development Act 2005* to clarify whether injurious affection compensation can be claimed in respect of a development application by a subsequent owner who obtained title through inheritance.

### Where injurious affection compensation is not available

- 5.129 Not every Government encumbrance that affects use or enjoyment, or value, of land has an avenue for claiming injurious affection compensation. For example, the EP Act does not provide for a landowner who has been injuriously affected by an ESA to be compensated.

### FINDING 19

Injurious affection compensation is available for some government encumbrances imposed for public benefit, but not for others.

### Environmentally Sensitive Areas

- 5.130 A number of submitters expressed their support for compensating landowners who have been adversely affected by an ESA:<sup>356</sup>

If Government environmental legislation inflicts a loss in the value of private property, (for the benefit of the community), then the community, not the property owner should bear the cost.<sup>357</sup>

<sup>355</sup> Timothy Hillyard, Chief Property Officer, Department of Planning, Land and Heritage, transcript of evidence, 17 February 2020, p 10.

<sup>356</sup> For example, Submission 12 from Kay and Bryon Micke, 24 July 2019; Submission 25 from S Mead, 28 July 2019; Submission 35B from Steve Chamarette, 30 July 2019; Submission 23 from Wayne Gowland, 28 July 2019; Submission 6 from WAFarmers, 18 July 2019 and Submission 48 from Peter Swift, 31 July 2019.

<sup>357</sup> Submission 35B from Steve Chamarette, 30 July 2019, p 1.

I am very concerned by the erosion of farmer property rights. If we are prevented from clearing land or using ESA areas for farming purposes, farmers should be compensated as it is for public benefit.<sup>358</sup>

Pay fair and reasonable compensation to the owner of private property affected by these uses if the value of the property is diminished by a government encumbrance or resumption in order to derive a public benefit.<sup>359</sup>

5.131 Submitters to this Inquiry have spoken of the need to strike a balance between landowners and the state in terms of who bears the cost.<sup>360</sup> The Committee has heard that regarding ESAs, the associated costs are disproportionately borne by landowners.<sup>361</sup> These costs may include:

- any decrease in value resulting from restrictions on the use of the property
- permit application fees
- maintenance and other costs associated with meeting biosecurity requirements.<sup>362</sup>

## FINDING 20

The cost of environmental protection as it relates to Environmentally Sensitive Areas is borne predominantly by landowners.

5.132 The PAF Committee discussed the need for fair compensation in relation to interests in land taken by the State Government for a public purpose back in 2004. While environmental regulation has evolved since that time, the principle can clearly be applied to ESAs:

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.<sup>363</sup>

5.133 Members of the Legislative Council referred to the 2004 report when debating a motion relating to ESAs in 2014. During this debate, a number of Members supported the principle of compensation for ESA, or at least acknowledged that the issue needs to be properly addressed.<sup>364</sup>

5.134 The main argument against ESA compensation has been the potential cost to the State:

**Hon SUE ELLERY:** On the view that a property owner should be compensated for it, as we made the point in the committee—I do not have the page reference—it is a huge issue for the state, whoever is in government. It would come at a huge cost if we were to change our system from one that does not have compensation built into it to one that does. I can appreciate, I guess, why since 2002 government, in response to our committee's report, has not bitten the bullet on that. I can understand that it is a big decision to make because it would involve an awful lot of money.

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<sup>358</sup> Submission 25 from S Mead, 28 July 2019, p 1.

<sup>359</sup> Submission 48 from Peter Swift, 31 July 2019, p 2.

<sup>360</sup> Submission 12 from Kay and Bryon Micke, 24 July 2019, pp 5-6.

<sup>361</sup> Submission 47 from Lorraine Finlay, 31 July 2019, p 5.

<sup>362</sup> Submission 23 from Wayne Gowland, 28 July 2019, p 2.

<sup>363</sup> Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7, *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004, p 42.

<sup>364</sup> For example, the Hons Rick Mazza, Nigel Hallett and Sue Ellery MLCs, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014 .



**Hon RICK MAZZA:** You're 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 that burden on reduced land values.<sup>365</sup>

- 5.135 According to Lorraine Finlay, while ESA compensation would undoubtedly impose a significant financial burden on the State, a significant financial burden is already being imposed:

It is just being imposed on individuals rather than the broader community. There is an obvious moral case for sharing these costs. If the community believes that it is important to impose restrictions on a particular parcel of land, then it is only fair that the community should be willing to share those costs.<sup>366</sup>

- 5.136 By providing an avenue for ESA compensation, public servants may be more inclined to consider the financial implications of the decision to 'lock away' certain land:

At present, a broad-brush approach tends to be applied as there is no tangible cost that government departments or individual bureaucrats need to consider before they 'sterilize' large areas of land under the guise of environmental protection.

Forcing the bureaucracy to actually consider the cost of these policies by imposing compulsory compensation mechanisms will lead to environment policies that are more targeted and better focused, effectively prioritizing areas of key environmental significance rather than the current 'super trawler' approach to environmental protection.<sup>367</sup>

- 5.137 It is not unheard of to compensate landowners for injurious affection arising from environmental restrictions. For example, under the Tasmanian *Nature Conservation Act 2002*, landowners who are prevented from clearing their land by the *Forest Practices Regulations 2017* may apply for compensation.<sup>368</sup> Assessment of compensation includes having regard to the value of any agricultural activities being carried out on the relevant land, and any agricultural potential of the relevant land unable to be realised.
- 5.138 It is worth noting that not every landowner with an ESA will have suffered injurious affection. Presumably, the landowner would need to have applied for a clearing permit, and had that application refused. The Committee is of the understanding that the clearing permit refusal would also need to negatively impact the value of the land. This may occur if the landowner is then required to cease or restrict farming or other productive activity on the land.
- 5.139 In 2018-19, DWER received 443 clearing permit applications, and refused to grant 15, or 3.4 percent.<sup>369</sup> Of those, only three were within an ESA, and DWER advised the presence of an ESA is unlikely to have been the reason for the refusal.<sup>370</sup> The Committee was not told the reason for the refusals.
- 5.140 It is not known how many landowners with an ESA on their property approached DWER to discuss lodging a clearing permit and were informed it was unlikely to be approved, so did not proceed to make an application.

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<sup>365</sup> *ibid.*, p 5678.

<sup>366</sup> Submission 47 from Lorraine Finlay, 31 July 2019, p 6.

<sup>367</sup> *ibid.*

<sup>368</sup> *Nature Conservation Act 2002* (Tas) s 41.

<sup>369</sup> Department of Water and Environmental Regulation, Answer to questions on notice 2 and 3 asked at hearing held 17 February 2020, dated 4 March 2020, pp 2-3.

<sup>370</sup> Kelly Faulkner, Executive Director, Regulatory Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, pp 7-8.

- 5.141 Injurious affection compensation for environmental regulation is not unheard of in WA. The *Country Areas Water Supply Act 1947* (CAWS Act) provides for the construction, maintenance, administration and safeguarding of water supplies to the Goldfields and Great Southern regions.<sup>371</sup> The CAWS Act has some similarities to the EP Act, in that a licence is required for certain land clearing to preserve water catchments.
- 5.142 Unlike the EP Act, the CAWS Act provides for the payment of injurious affection compensation where a licence is refused, rendering their land unproductive or uneconomic, or otherwise injuriously affecting the land.<sup>372</sup> The WALRC pointed out that in some cases, both a licence under the CAWS Act and permit under the EP Act will be required in relation to the same land:

Hence, refusal of authority to clear land in a control area attracts compensation under one Act and no compensation under another.<sup>373</sup>

## FINDING 21

The *Country Areas Water Supply Act 1947* provides for the payment of injurious affection compensation where a licence for land clearing to preserve water catchments is refused and the land is rendered unproductive, or uneconomic, or has otherwise been injuriously affected.

- 5.143 The Minister for Environment told the Committee that he does not support compensation arising from the presence of ESAs:

The effect of ESAs is much less significant than the clearing provisions as a whole, as can be seen from statistics on the area of clearing refused. In addition, the impact of ESAs is only to require a clearing permit, which is the requirement for the majority of clearing in any case.<sup>374</sup>

- 5.144 In the absence of supporting evidence, the Committee is not persuaded that the only impact of an ESA is to require a clearing permit.

### *Permit costs*

- 5.145 Apart from any injurious affection that may be suffered, landowners may be subject to significant costs to apply for a clearing permit. Landowners who apply for a permit to clear on an ESA will pay between \$400 and \$10 000 depending on the size of the application area.<sup>375</sup> In 2018-19, fees for the assessment of clearing permits were increased for the first time since the introduction of the clearing provisions in the EP Act.
- 5.146 Permit application fees are used to fund the application and assessment process, including increasing staff numbers, developing and updating guidance documents and improving systems.<sup>376</sup> DWER estimate that even with the new fee structure, fee revenue only covers 6 percent of the cost of its service.<sup>377</sup>

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<sup>371</sup> Law Reform Commission of Western Australia, *Project 98: compensation for injurious affection*, 2008, p 75.

<sup>372</sup> *Country Areas Water Supply Act 1947* s 12E.

<sup>373</sup> Law Reform Commission of Western Australia, *Project 98: compensation for injurious affection*, 2008, p 76.

<sup>374</sup> Hon Stephen Dawson MLC, Minister for Environment, letter, 15 October 2019, p 1.

<sup>375</sup> *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* r 7.

<sup>376</sup> Department of Water and Environmental Regulation. See: <https://www.der.wa.gov.au/our-work/clearing-permits/fees/faqs>. Viewed 10 September 2020.

<sup>377</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 4.

5.147 DWER confirmed that the permit fee is paid upfront to cover the cost of the application and assessment process. Refunds are not given when an application is refused, but may be considered when an application is withdrawn prior to a decision being made.<sup>378</sup>

5.148 Although the risk of refusal may be acceptable for a \$400 fee, a \$10 000 fee is a significant risk. To avoid paying a permit fee only to have an application refused, DWER recommend that applicants engage with them early and often:

For those applicants who are looking at large areas that might have significant environmental impacts, we absolutely encourage them to talk to the department in the first instance before they lodge an application. The department is able to provide some desktop advice, looking at some desktop information and looking at those values, and can have a frank discussion about the possibilities.<sup>379</sup>

5.149 In addition, DWER publish a guide to the assessment of applications to clear native vegetation to inform applicants about what they should consider before and during the process.<sup>380</sup> The Committee notes that the fees apply to all clearing permit applications, not just those on an ESA.

### Energy operators

5.150 As outlined in Chapter 3, energy operators in WA have the power under the EOP Act to compulsorily acquire, enter and occupy land to carry out necessary public works. Compensation for compulsory acquisition is governed by Parts 9 and 10 of the LA Act, but is subject to the EOP Act.

5.151 Under section 45(4) of the EOP Act, energy operators are not required to acquire an easement for new transmission lines below 200kV:

Western Power is obliged under the *Energy Operators (Powers) Act 1979* to acquire land or an interest in land, typically an easement, whenever it is operating network infrastructure at or above 200kV. For all other network infrastructure operating below 200kV, Western Power is not obliged to acquire land or an interest in land, however they may choose to for operational reasons.<sup>381</sup>

5.152 This acts as a limit on potential injurious affection claims. Where an Energy Operator takes an interest that is less than fee simple (such as an easement), the landowner is not entitled to claim compensation for resulting diminution of the value of any adjoining land, which otherwise arises from section 241(7) of the LA Act.

5.153 Other limitations exist under the EOP Act. Section 45(1) and (2) provide that, in relation to claims against the energy operator for the use of land and the application of the LA Act:

(1) Subject to subsection (3), an energy operator shall not be liable to pay compensation for, or in respect of any damage attributable to, the placing of any works or other things to which section 43(1) applies or by virtue of the grant of the right of access deemed by that subsection to be vested in the energy operator.

(2) No claim lies against an energy operator by reason of any loss of enjoyment or amenity value, or by reason of any change in the aesthetic environment,

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<sup>378</sup> Kelly Faulkner, Executive Director, Regulatory Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 6.

<sup>379</sup> *ibid.*

<sup>380</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 8.

<sup>381</sup> Hon Ben Wyatt MLA, Minister for Lands, letter, 1 November 2019, p 2.

alleged to be occasioned by the placing of works of the energy operator on any land.

5.154 The Committee heard support for extending compensation to landowners impacted by easement. For example, WA Land Compensation suggest:

Section 241 (7) of the Land Administration Act should be amended. Fee Simple should be replaced with any interest in land. That would then include easement interests for pipelines & power lines.<sup>382</sup>

5.155 The Hon Rick Mazza MLC noted in the Legislative Council that this debate has been going on for years:

I would like to see this government or a future government introduce a bill of some kind that would give some surety of compensation for blighting or easements that could affect the value of a person's private property in this state. It is lacking; it is a conversation that has been ongoing in this place for many years. I do not know for how much longer the conversation can go on without some action taking place along the lines I have advocated here today.<sup>383</sup>

5.156 A number of recommendations from the 2004 Inquiry pertained to the Western Power Corporation. The Western Power Corporation has since been abolished and replaced by three statutory, government-owned corporations:

- Synergy – South West Interconnected System (Verve merged with Synergy in 2014)
- Horizon – regional/remote – everywhere outside of the South West Interconnected System
- Western Power (Electricity Networks Corporation) – South West Interconnected System.

5.157 Energy Policy WA was established as a standalone sub-department of the Department of Mines, Industry Regulation and Safety in 2019.<sup>384</sup> Energy Policy WA administers the EOP Act.

5.158 The PAF Committee made three main recommendations in relation to compensation and energy operators:

**Recommendation 10:** The Committee recommends that an appropriate method and level of compensation should be established by legislation for those landholders whose land is subject to an electricity transmission line easement. To achieve that end, the Committee recommends that one of the following two options be implemented by the State Government:

(a) Section 45(2) of the *Energy Operators (Powers) Act 1979* be repealed; and

(b) The *Land Administration Act 1997* be amended to expressly provide for compensation to a landholder for injurious affection to the landholder's land arising from the acquisition by a State Government department, agency or body of any interest in that landholder's land. The calculation of injurious affection should also take into account the value of the land covered by the easement.

or

Both the *Energy Operators (Powers) Act 1979* and the *Land Administration Act 1997* be amended to provide that the compensation to be paid to a landholder for the

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<sup>382</sup> Submission 10 from Western Australia Land Compensation, 23 July 2020, p 11.

<sup>383</sup> Hon Rick Mazza MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 June 2019, p 4013.

<sup>384</sup> Energy Policy Western Australia. See: <https://www.wa.gov.au/organisation/energy-policy-wa>. Viewed 10 September 2020.

acquisition by Western Power Corporation of an electricity transmission line easement must include a component for land value that is equivalent to one hundred per cent of the land value of the land covered by the easement.

**Recommendation 11:** The Committee recommends that the *Energy Operators (Powers) Act 1979* be amended to require that Western Power Corporation shall obtain an easement for all electricity transmission lines constructed on freehold land.

**Recommendation 12:** The Committee recommends that the Attorney General, independent of the amendment to the *Land Administration Act 1997* contained in Recommendation 10, refer the broad issue of compensation for injurious affection to land in Western Australia to the Law Reform Commission of Western Australia for review.<sup>385</sup>

- 5.159 A full list of recommendations, with the corresponding initial government response and update on implementation status can be found at Appendix 2.

#### *Implementation status*

- 5.160 The WA Government remains unsupportive of recommendation 10, which provides two options for extending compensation to landowners impacted by an energy easement. The Minister for Lands told the Committee that current legislation achieves an appropriate balance between providing low cost electricity to the public, and the private interests of landowners. A change in this position would likely result in costs being passed on to electricity consumers:

As at 2015/16, there were some 67,000 km of overhead powerlines in Western Australia. Any consideration of legislative change as recommended by the Committee could have significant financial implications for the State and it may be that additional costs imposed from the compensation required by the proposed change would increase the cost of new electricity infrastructure, which would almost certainly be passed onto consumers. In some areas of the State, it may render the installation of electricity infrastructure uneconomic and prevent potential users from accessing an essential service.<sup>386</sup>

- 5.161 The Minister for Lands did not provide an update on the status of recommendation 11. With reference to the EOP Act, the recommendation has not been implemented.
- 5.162 Recommendation 12, that the Attorney General refer the broad issue of compensation for injurious affection to land to the WALRC, has been implemented. In 2008, the WALRC published its final report on Project 98 – Compensation for Injurious Affection.
- 5.163 The WALRC report built on and further interrogated the PAF Committee's inquiries into injurious affection compensation from energy operators. In relation to energy operators, the WALRC recommended that:

#### **Recommendation 24**

The Commission recommends that other statutes which provide for acquisitions by agreement reflect or incorporate ss 168 and 169 of the *Land Administration Act 1997 (WA)* where land is acquired for public purposes at the government's initiative and where reserved land is acquired.

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<sup>385</sup> Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7 *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004, p v.

<sup>386</sup> Hon Ben Wyatt MLA, Minister for Lands, letter, 1 November 2019, p 2.

### Recommendation 28

The Commission recommends that s 45(2) of the *Energy Operators (Powers) Act 1979* be amended so as not to derogate from s 241(7) of the *Land Administration Act 1997* (WA), but to otherwise remain operative; that is, in respect of persons who have not suffered a taking of land.<sup>387</sup>

- 5.164 The 2014 LALAC Bill proposed to implement 14 of the WALRCs 31 recommendations, and included several amendments to the EOP Act to deliver a fairer and more transparent approach for the assessment and determination of compensation for landholders where private property is acquired by the state.<sup>388</sup>
- 5.165 Unlike the LALAC Bill, the proposed Land Administration Bill<sup>389</sup> will only amend the LA Act. The Committee asked the Minister for Energy if there are any plans to progress the WALRCs recommendations, including amending the EOP Act:
- to incorporate sections 168 and 169 of the LA Act where land is acquired for public purposes at the government's initiative and where reserved land is acquired (recommendation 24)
  - so as not to derogate from section 241(7) of the LA Act (recommendation 28).
- 5.166 The Minister for Energy advised that these amendments are not a priority because of potential financial implications:
- the implementation of proposals of this form could potentially have significant financial implications for the State and would require a thorough investigation of the public benefits and costs.
- Given these potential financial implications the proposals are not considered to be a priority matter from an energy portfolio perspective.<sup>390</sup>

### RECOMMENDATION 24

The Western Australian Government assess the potential costs of implementing recommendations 24 and 28 from the Law Reform Commission of Western Australia's 2008 project on compensation for injurious affection, so that the potential financial implications can be better understood, and publish a report detailing the findings of the assessment.

### Case studies—Western Power infrastructure

- 5.167 Don Robertson told the Committee about how the presence of power lines on his farm has added significant costs to his plans to replace a boundary fence. About thirteen native marri trees growing near the boundary require removal to proceed with the fence. Mr Robertson suggests that this task would be relatively simple and inexpensive, if not for the power lines:
- Removal of the trees will be about \$12,000 more than usual in these circumstances because there are Western Power lines close to the fence. Specialised equipment and procedure must be used to safely fell the trees without damage to the power lines.

<sup>387</sup> Law Reform Commission of Western Australia, *Project 98: compensation for injurious affection*, 2008, pp 83-4.

<sup>388</sup> Land Acquisition Legislation Amendment (Compensation) Bill 2014, *Explanatory Memorandum*, Legislative Council, p 1.

<sup>389</sup> See paragraph 5.35 on the Department of Planning, Lands and Heritage's proposed new Land Administration Bill to amend the *Land Administration Act 1997*.

<sup>390</sup> Hon Bill Johnston MLA, Minister for Energy, letter, 2 April 2020, p 1.

Western Power refuses to share costs of removing thirteen trees or reduce the cost by temporarily lowering the power lines to the ground, even though it is likely tree removal now would save Western Power and taxpayers greater ongoing annual pruning costs.<sup>391</sup>

Figure 4. *Native marri trees that must be removed to replace the boundary fence*



[Source: Submission 59 from Don Robertson, 31 July 2019, p 1.]

5.168 In a reply email, Western Power declined to assist for the following reasons:

- The cost of doing so being cost prohibitive in relation to our annual and ongoing maintenance program, especially when considering the precedent this would set for other members of the public.
- The need to consider local flora and fauna. In particular, our environment area expressed concern about the possibility of nesting Black Cockatoos, and the requirement to apply for approval for pruning/removal from the Commonwealth Department of Environment and Energy.<sup>392</sup>

5.169 The Commonwealth Department of Environment and Energy seeks cost recovery for environmental assessment and approval processes carried out under the *Environmental Protection and Biodiversity Conversation Act 1999*. The Hon Jessica Shaw MLA pointed out in her correspondence to Mr Robertson that the potential environmental costs for the works at hand could be in order of \$50 000.<sup>393</sup>

5.170 Mr Robertson submitted that Western Power's refusal to assist or compensate landowners in such circumstances is contrary to their submission to the 2004 Inquiry:

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<sup>391</sup> Submission 59 from Don Robertson, 31 July 2019, p 1.

<sup>392</sup> *ibid.*, p 2.

<sup>393</sup> *ibid.*, p 3.

Western Power is required to make good or otherwise pay adequate compensation for the damage to land that is attributable to its entry onto land and the erection of its works there.<sup>394</sup>

- 5.171 Western Power did not believe that point was relevant to the case at hand.
- 5.172 Beryl Crane also told the Committee about this issue. In preparing to replace a boundary fence:

I asked a contractor a few weeks ago if he could provide a price to clear the trees impacting on the fence and the firebreak and he advised that whilst he could manage most of the tree branches adequately there were a number of living trees and at least two dead ones that would not be safe for him to trim or remove because they were either closer than 1.8m to the power line or too tall to fell without risk of hitting the powerline.

The alternative was to bring in a cherry picker and licenced contractor which would be prohibitively expensive from his point of view. He also felt that it was the responsibility of Western Power to maintain the safety of the powerlines in these circumstances where specialist services were required.<sup>395</sup>

- 5.173 Ms Crane is now in a position where the local council has granted authority for clearing around the boundary, but her ability to clear is restricted by the proximity of the power lines. She notes that when the easement for the property was first put in place, no compensation was paid despite restrictions on use and potential future impacts:

It certainly seems like the public utilities consider it to be 'their' property when it suits them but our responsibility when it suits them also.<sup>396</sup>

- 5.174 The Committee also received evidence from Terrence Ealing, a landowner with power lines and poles on his property. Mr Ealing believes that in accessing his property to conduct works, Western Power have caused damage, including running over reticulation and introducing Cotton Flax, a gazetted weed.<sup>397</sup>

- 5.175 The Committee raised this with Western Power, who advise that their Safety, Health and Environmental Management System includes procedures and work instructions related to land access and associated biosecurity risks.<sup>398</sup> The Environmental and Land Access Agreement Procedure applies to construction, modification and demolition works, and requires that:

- evidence of risk mitigation in the design phase be documented
- assessments be carried out when potential impacts are identified that require subject matter expertise
- when required by legislation, land access approvals are obtained.<sup>399</sup>

- 5.176 These cases illustrate how Energy Operator infrastructure can affect landowners, even where the circumstances may not trigger a legislative compensation claim.

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<sup>394</sup> Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7, *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004, p 91.

<sup>395</sup> Submission 81 from Beryl Crane, 31 July 2019, p 1.

<sup>396</sup> *ibid*, p 2.

<sup>397</sup> Submission 7 from Terrence Ealing, 18 July 2019, pp 8-9.

<sup>398</sup> Ed Kalajzic, Chief Executive Officer, Western Power, letter, 9 September 2020, p 1.

<sup>399</sup> *ibid.*, Attachment 1, pp 1-2, 4, 6. More detail is available in correspondence from Western Power dated 9 September 2020, available on the Committee's webpage.



## FINDING 22

The presence of electricity transmission lines on private property may increase the costs to the landowner associated with undertaking works on the property.

## RECOMMENDATION 25

The Minister for Energy consider requiring Western Power to compensate landowners carrying out reasonable works on their property for any additional costs incurred as a result of electricity transmission lines on the property.

## Compensation on 'just terms'

5.177 Submitters suggest that compensation should not only be available—it should also be fair. Some have linked the concept of fair and reasonable compensation to the requirement in the Australian Constitution that property be acquired on 'just terms'.<sup>400</sup> Here, the Committee will consider the suggestion that a similar provision should apply in WA.

### The Australian Constitution

5.178 Section 51(xxxi) of the *Commonwealth of Australia Constitution Act* (Australian Constitution) provides that the Federal Parliament must exercise its power to acquire property from any state or person 'on just terms':

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxx) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;<sup>401</sup>

5.179 This provision has been described as a 'very great constitutional safeguard',<sup>402</sup> which has its roots in universal human rights:

The Constitutional requirement of 'just terms' in a Commonwealth acquisition law, can be characterised as a manifestation of a fundamental or core legal right of the kind sought to be protected in the Universal Declaration on Human Rights and the Constitution of the United States of America, with an ancestry that dating back at least to the Magna Carta of 1215.<sup>403</sup>

5.180 The 'just terms' provision is limited in two ways:

- it does not apply to property acquired by States
- it only applies to property 'acquired', which may mean that it does not extend to injurious compensation for interests that are less than the taking of a freehold interest in land (such as planning reservations and restrictions imposed by environmental regulations).

5.181 Because the states are not directly bound by the 'just terms' guarantee, they have a much wider constitutional power of eminent domain.<sup>404</sup> In 1949, Chief Justice Latham said:

<sup>400</sup> See, for example, Submission 11 from Murray Nixon, 24 July 2019 and Submission 32 from Western Australian Property Rights Association, 30 July 2019.

<sup>401</sup> *Commonwealth of Australia Constitution Act* (Cth) s 51xxxii.

<sup>402</sup> CJ Barwick, *Trade Practices Commission v Tooth 1979* [1979] HCA 47.

<sup>403</sup> Glen McLeod, 'The Tasmanian Dam case and setting aside private land for environmental protection: who should bear the cost?', *The Western Australian Jurist*, 2015, vol. 6, p 126.

<sup>404</sup> D Jackson and S Lloyd, 'Compulsory Acquisition of Property', *AMPLA Yearbook*, 1998.

if they judge it proper to do so for some reason, may acquire property on any terms which they may choose to provide in a statute, even though the terms are unjust.<sup>405</sup>

- 5.182 Compensation for property acquisition in WA arises from the LA Act. The DPLH webpage states:

The High Court decision of *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.

The power vested in this State to take land or interests in land is set out in Part 9 of the LAA and the compensation entitlement of owners of interests in land taken under Part 9 is set out in Part 10 of the LAA.<sup>406</sup>

### **What the Committee heard**

- 5.183 The Committee heard strong support for the enshrinement of a 'just terms' requirement in the WA Constitution:

Given that there is no constitutional provision equivalent to s. 51 (xxxii) in the States at all, the "deprivation of property gap" in State laws is a yawning one and much more significant.<sup>407</sup>

- 5.184 Former Member of the Legislative Council and President of the Gingin Private Property Rights Group, Murray Nixon, told the Committee:

At Federation, the States were concerned that the new Government would acquire State land and made it clear in the Federal Constitution that it could only be acquired on Just Terms. Unfortunately, because there is not a similar clause in our State Constitution some claim that only the Federal Government is required to compensate. This in turn has led the Federal Government using the States as a way of avoiding having to pay compensation for Property Rights damaged by International Agreements.<sup>408</sup>

- 5.185 Submitters expressed support for such a provision to extend to other types of resumption, such as environmental restrictions and fishing licences:

There is a clause in the Federal Constitution that ensures property can only be acquired on just terms, however there is no similar clause in the State Constitution. This has often meant that environmental legislation has blighted property rights but no compensation has been available to the landowner.<sup>409</sup>

When government removes or diminishes rights to property without assuming full ownership it should be seen as 'acquiring' a proportionate number of the rights in the proprietary 'bundle'.<sup>410</sup>

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<sup>405</sup> *CJ Latham in PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382.

<sup>406</sup> Department of Planning, Lands and Heritage. See: <https://www.dplh.wa.gov.au/information-and-services/crown-land/appeals-and-compensation>. Viewed 10 September 2020.

<sup>407</sup> Submission 40 from Peter Ingall, 30 July 2019, attachment 1, p 3.

<sup>408</sup> Submission 11 from Murray Nixon JP OAM, 24 July 2019, p 4.

<sup>409</sup> Submission 31 from Arthur and Linda Williams, 29 July 2019, p 1.

<sup>410</sup> Submission 6 from WAFarmers, 18 July 2019, p 5.

## A 'just terms' provision for Western Australia?

5.186 In a 1988 constitutional referendum, Australians were asked whether the constitutional requirement of 'just terms' should be extended to property acquired under the law of a state or territory. The question was defeated, along with other proposed amendments:

The true level of public support for the idea was, however, impossible to gauge due to the way in which the question was presented as part of a larger package.<sup>411</sup>

5.187 In 2004, the PAF Committee recommended:

that any future review by the State Government of the Western Australian constitutional legislation should include detailed consideration as to whether a 'just terms' or 'fair' compensation provision needs to be incorporated into the legislation with respect to the acquisition by the State Government for public purposes of privately-held property.<sup>412</sup>

5.188 At the time, the WA Government agreed to consider the provision during any future review of the WA Constitution. However, it noted that a constitutional guarantee would not substantively change the operation of legislation such as the LA Act, and that such a provision would need to operate as a limitation on state legislative power.<sup>413</sup>

5.189 When providing an update in 2019, the WA Government told the Committee that the recommendation has been considered and investigated. It was determined that there are several reasons why a 'just terms' provision in the WA Constitution may not be appropriate, including that a 'just terms' provision:

- does not appear to be necessary in the field of compulsory land acquisition
- could have far reaching effects in other areas of state legislation, which would limit the ability of the WA Government to pursue its legislative agenda and the WA Parliament to enact legislation
- could subvert the public interest to private rights in situations where the compensation payable might be prohibitive
- would require a WA referendum to be introduced
- would represent a departure from the approach adopted in all other Australian states.

### FINDING 23

The Western Australian Government is of the view that a provision guaranteeing that property be acquired on just terms may not be appropriate in the *Constitution Act 1889*, and would not substantially change the operation of legislation such as the *Land Administration Act 1997*.

5.190 The Committee has investigated and confirmed that no other state constitution contains a requirement that acquisition of property occur on just terms. However, as the PAF Committee noted in 2004, a number of states have instead included a 'just terms' compensation obligation in relevant land acquisition legislation. While the LA Act does not

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<sup>411</sup> Sean Brennan, 'Section 51(xxxi) and the acquisition of property under Commonwealth-State arrangements: the relevance to native title extinguishment on just terms', *Australian Indigenous Law Review*, 2011, vol. 15, 2, p 74.

<sup>412</sup> Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7 *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004, p 217.

<sup>413</sup> Western Australian Government, *Response to the Standing Committee on Public Administration and Finance in relation to Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, July 2004.

contain a specific reference to 'just terms', the compensation regime operates in a similar way to those states that do use the express term.<sup>414</sup>

- 5.191 While the broad issue of 'just terms' was outside the scope of the 2008 WALRC project on Compensation for Injurious Affection, the WALRC did recommend that section 241 of the LA Act be amended to include a reference to 'just' compensation, similar to that in section 54(1) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW):

**54 Entitlement to just compensation**

- (1) The amount of compensation to which a person is entitled under this Part is such amount as, having regard to all relevant matters under this Part, will justly compensate the person for the acquisition of the land.
- (2) If the compensation that is payable under this Part to a person from whom native title rights and interests in relation to land have been acquired does not amount to compensation on just terms within the meaning of the Commonwealth Native Title Act, the person concerned is entitled to such additional compensation as is necessary to ensure that the compensation is paid on that basis.<sup>415</sup>

- 5.192 In 2014, the LALAC Bill proposed to make this amendment:

In addition, this bill will enshrine in the Western Australian *Land Administration Act 1997* the requirement that compensation be provided to landholders on just terms. Although in practice there are well-established common law rules to require that there be just compensation, the insertion of an express reference to just terms will ensure that all parties must recognise this.

- 5.193 As mentioned earlier in this Chapter, the LALAC Bill did not proceed past the second reading stage. However, DPLH has confirmed that amendments to the LA Act from the LALAC Bill, in some form, will be progressed as part of the new Bill to amend the LA Act, which is currently being drafted.

**RECOMMENDATION 26**

The Western Australian Government amend section 241 of the *Land Administration Act 1997* to include a reference to 'just' compensation, as recommended by the Western Australian Law Reform Commission in 2008.

**RECOMMENDATION 27**

The Western Australian Government amend relevant sections of all legislation which enables the Western Australian Government to take actions impacting private property rights, to require compensation on just terms.

**Outstanding issues**

- 5.194 Glen McLeod, Director of Glen McLeod Legal told the Committee that WA requires a positive, express 'just terms' right in the state constitution:

<sup>414</sup> Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, Report #7, *Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, May 2004, p 56.

<sup>415</sup> *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) s 54.

such a right that is a positive right to protect property rights exists at common law. It is just that it has been not enforced over many years because of the rise of statutory systems for providing compensation.

At the time the federal Constitution was written and the states' constitutions were written, my view is that there was a right that was taken for granted. Unfortunately, it was too taken for granted. They did not write a positive right into the state Constitution. I think that needs to be addressed.<sup>416</sup>

- 5.195 While the Committee notes this argument, it is of the view that a more appropriate first step is to enshrine the notion of 'just terms' in all relevant legislation.

## Conclusion

- 5.196 Injurious affection in relation to land operates in WA under two key Acts—the LA Act and the PD Act. Other encumbrances, such as ESAs and easements for energy operators to access a property, do not give rise to a right to claim injurious affection compensation.
- 5.197 Landowners who submitted to this Inquiry often did not dispute that land could, or should be reserved or acquired for a public purpose. However, these landowners submit that compensation should be payable, and should be fair and reasonable.
- 5.198 Similarly, landowners impacted by power lines submit that energy operators should be required to register an easement and just compensation should be payable, not only for the restricted use of the land the subject of the easement, but also for the additional costs incurred by the landowner for associated works as a result of the power lines.
- 5.199 A number of relevant recommendations from the PAF Committee and the WALRC remain outstanding, after more than a decade. As recommended in this Chapter, the Committee considers that progressing these changes will lead to improvements for landowners.

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<sup>416</sup> Glen McLeod, Principal, Glen McLeod Legal, transcript of evidence, 18 November 2019, p 4.

## CHAPTER 6

# Government issued licences and authorities—water

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### Introduction

- 6.1 The core issue in this Chapter is term of reference (c), which required the Committee to inquire into the property rights of government-issued licences and authorities, including commercial fishing. In considering the extent to which the rights conferred by licences are proprietary in nature, this Chapter relates to a lesser extent to terms of reference (b) and (d), regarding disclosure and compensation.
- 6.2 Licences are not real property in the way that land is. However, licences may include some proprietary characteristics, and can be thought of as existing on a continuum of property interests. The Committee understands that it is for this reason that people tend to think of certain licences as property.
- 6.3 The WA Government issues a wide range of licences and authorities. For example, Lotterywest provides authority to retailers to act as agents, and the Minister for Education can licence properties to be used as school premises.<sup>417</sup>
- 6.4 Two types of licences were raised through submissions, and the Committee has inquired into these:
- water—discussed in this Chapter
  - fishing—discussed in Chapters 7 and 8.
- 6.5 Water resources are some of the State’s most important, underpinning major industries including agriculture, mining, industry and urban development.<sup>418</sup> For some groups, such as farmers, the right to access water is a key and valuable asset.
- 6.6 Water is also an increasingly scarce and vulnerable resource. Rainfall in the southwest has reduced by around 15 percent since the mid-1970s, and it is projected to continue to decline.<sup>419</sup> The Minister for Regional Development; Agriculture and Foods; and Ports said of the water availability landscape last year:
- this is a time when we are facing very, very significant climate change, which is bringing, particularly to the southern half of our state, a significant reduction in rainfall and an increase in heat, and we clearly have a problem. It is important to make this very clear.<sup>420</sup>
- 6.7 This Chapter will outline:
- water administration in WA, including current legislation governing the granting of licences and proposed reforms
  - the rights associated with water licences, and whether these are proprietary in nature

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<sup>417</sup> Hon Mark McGowan MLA, Premier, letter, 29 September 2020, p 2 and Hon Sue Ellery MLC, Minister for Education and Training, letter, 19 September 2019, p 1.

<sup>418</sup> Department of Water, *Securing Western Australia’s water future*, August 2013, p iii.

<sup>419</sup> *ibid.*, p 3.

<sup>420</sup> Hon Alannah MacTiernan MLC, Minister for Regional Development, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 14 March 2019, p 1251.

- current issues raised in submissions, including encouraging efficiency and equity in water use, the Warren Donnelly Surface Water Allocation Plan, registration of water entitlements and compensation.

## Water administration in Western Australia

### Legislation

6.8 DWER is responsible for managing water resources in WA. Water resources in WA are currently managed under six Acts.

Table 4. *Water management legislation in Western Australia*

Act	Function
<i>Water Agencies (Powers) Act 1984</i>	Outlines the general functions of the Minister for Water and enables DWER to coordinate cross-government efforts to protect and manage water resources.
<i>Rights in Water and Irrigation Act 1914</i>	<ul style="list-style-type: none"> <li>• Provides for the regulation, management, use and protection of water resources.</li> <li>• Enables DWER to grant licences to take water, construct wells (including bores and soaks) and interfere with the bed and banks of a watercourse.</li> <li>• Enables DWER to grant permits for activities that may damage, obstruct or interfere with water flow.</li> </ul>
<i>Country Areas Water Supply Act 1947</i>	Protects public drinking water sources in country areas. The CAWS Act and CAWS Regulations are used to manage and prevent salinisation of water resources in the clearing control catchments, which are the Mundaring Weir, Wellington Dam, Harris River Dam and Denmark River catchment areas and the Warren River and Kent River water reserves.
<i>Metropolitan Water Supply, Sewerage and Drainage Act 1909</i>	Protects public drinking water sources in metropolitan areas.
<i>Environmental Protection Act 1986</i>	Provides for the clearing of native vegetation in and around wetlands.
<i>Waterways Conservation Act 1976</i>	Provides for management of declared waterways, i.e. Albany waterways, Avon River, Wilson Inlet, Peel Inlet and Leschenault Inlet.
<i>Metropolitan Arterial Drainage Act 1982</i>	Provides for an arterial drainage scheme and the declaration of drainage courses.

[Source: Department of Water and Environmental Regulation. See: <https://www.water.wa.gov.au/legislation/current-legislation/water-resources-management-legislation>. Viewed 10 September 2020.]

6.9 DWER also provides exemptions for water utilities from licencing under the *Water Services Act 2012*.

## Water licencing

- 6.10 Licences and permits are granted under the:
- *Rights in Water and Irrigation Act 1914* (RIWI Act)
  - *Country Areas Water Supply Act 1947*
  - *Waterways Conservation Act 1976*.
- 6.11 The RIWI Act allows the State to control waters in a watercourse, wetland or underground water source, with certain exceptions for water flowing from springs or in wetlands within the boundaries of private property.<sup>421</sup>
- 6.12 This Chapter focuses primarily on the most commonly issued type of licence, a licence to take water under section 5C of the RIWI Act.<sup>422</sup> A 5C licence allows the licence holder to take a specified amount of water from a watercourse, well, and/or underground source. It is an offence to take water without a licence (exemptions apply).
- 6.13 A water licence is a legal document with terms, conditions and limits, and does not give the holder ownership of the water resource—water remains vested in the Crown, and the licence grants limited access for a specified duration.<sup>423</sup>
- 6.14 DWER summarised the process:
- People apply to us for a licence to access the water, subject to the water being available and for us undertaking assessment against the requirements of the legislation. The licence is issued typically for a period of 10 years, so that then grants those people an authorisation to use the water consistent with the licence terms and conditions.
- In addition to that, there are a series of riparian rights that people have access to, so if they are close to a river or stream, they may have access to that water without requiring a licence from us. There is also an exemption under the legislation in those circumstances where the spring rises on a person's property to be able to use that water without licencing.<sup>424</sup>
- 6.15 Licences to take water are issued on a 'first-in, first-served' methodology.
- 6.16 At the time of considering an application for a licence to take water, DWER considers the information provided with the application against the matters it considers relevant, consistent with Schedule 1, Clause 7(2) of the RIWI Act having due regard to the size of the property, the type of agricultural use and the reasonable needs for the proposed development/use.<sup>425</sup>
- 6.17 The licensee should take and use water consistent with the authorised purposes and terms and conditions of the water licence. If water is taken for any of the purposes stated in the licence, the water will be considered to be 'used'.<sup>426</sup> Water may be used for agricultural or other purposes, such as drought proofing. In surface water, the water may be used for

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<sup>421</sup> *Rights in Water and Irrigation Act 1914*, ss 5, 5A.

<sup>422</sup> Jason Moynihan, Acting Executive Director, Regulatory Services, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 2.

<sup>423</sup> Department of Water and Environmental Regulation. See: <https://www.water.wa.gov.au/licensing/water-licensing/types-of-licenses>. Viewed 10 September 2020.

<sup>424</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 2.

<sup>425</sup> Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 5.

<sup>426</sup> *ibid.*, pp 3-4.



managing losses and dam maintenance as part of holistic and sustainable business planning.<sup>427</sup>

- 6.18 Licences with water entitlements of 10 000 KL or more are required to meter or measure their water use in accordance with the *Rights in Water and Irrigation Regulations 2000* (RIWI Regulations).<sup>428</sup> In some cases, DWER may approve an alternative measurement method if it is impracticable to install a meter. In surface water resources, water may be taken by interception of stream flow in a dam and alternative measurement methods may be adopted if necessary. Direct pumping is generally metered to measure this take from the resource.<sup>429</sup>
- 6.19 A water licence does not guarantee that there will be sufficient water in the resource specified on the licence to enable the licensee to take their entitlement each year. DWER would be able to terminate the licence consistent with the legislation and policy of the time. DWER advise the circumstances of the termination may give rise to a financial impost on the State. However it is not possible to describe what, if any, impost there may be, without knowing the full circumstances leading to a potential termination.<sup>430</sup>
- 6.20 At the time of renewing a water entitlement, DWER may consider, but is not limited to, the allocation status of the resource, water allocation planning objectives for the area, historical use by the licensee, current and future use and demand, and the licensee's circumstances and reasons for not complying with the licence.<sup>431</sup>
- 6.21 DWER may reduce an entitlement under a water licence where the quantity of water that may be taken under the licence has consistently not been taken.<sup>432</sup>
- 6.22 DWER's policy, *Management of Unused Licensed Water Entitlements*, recommends a timeframe of three years for a water entitlement to be considered unused.<sup>433</sup> However, local water allocation plans may have a different timeframe for action. In such circumstances, the water allocation plan applies.<sup>434</sup>
- 6.23 Under Schedule 1, Clause 24(2)(d) of the RIWI Act, DWER may amend a licence where the quantity of water that may be taken under the licence has consistently not been taken. DWER provides the licensee with the opportunity to comment on the proposal before making a decision to reduce the entitlement. If the licensee does make comments, DWER is to have regard to those comments before making its final decision.<sup>435</sup>
- 6.24 The head of power to reduce a licenced entitlement at the time of licence renewal is under Schedule 1, Clause 15. Licences issued under the RIWI Act contain a number of terms and conditions, including annual water entitlement. The licensee must meet these terms and conditions if access and use of the water is to be maintained.<sup>436</sup>

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<sup>427</sup> *ibid.*, p 7.

<sup>428</sup> *ibid.*, p 6.

<sup>429</sup> *ibid.*

<sup>430</sup> *ibid.*, p 14.

<sup>431</sup> *ibid.*, p 4.

<sup>432</sup> *Rights in Water and Irrigation Act 1914*, schedule 1 cl 24(2)(d).

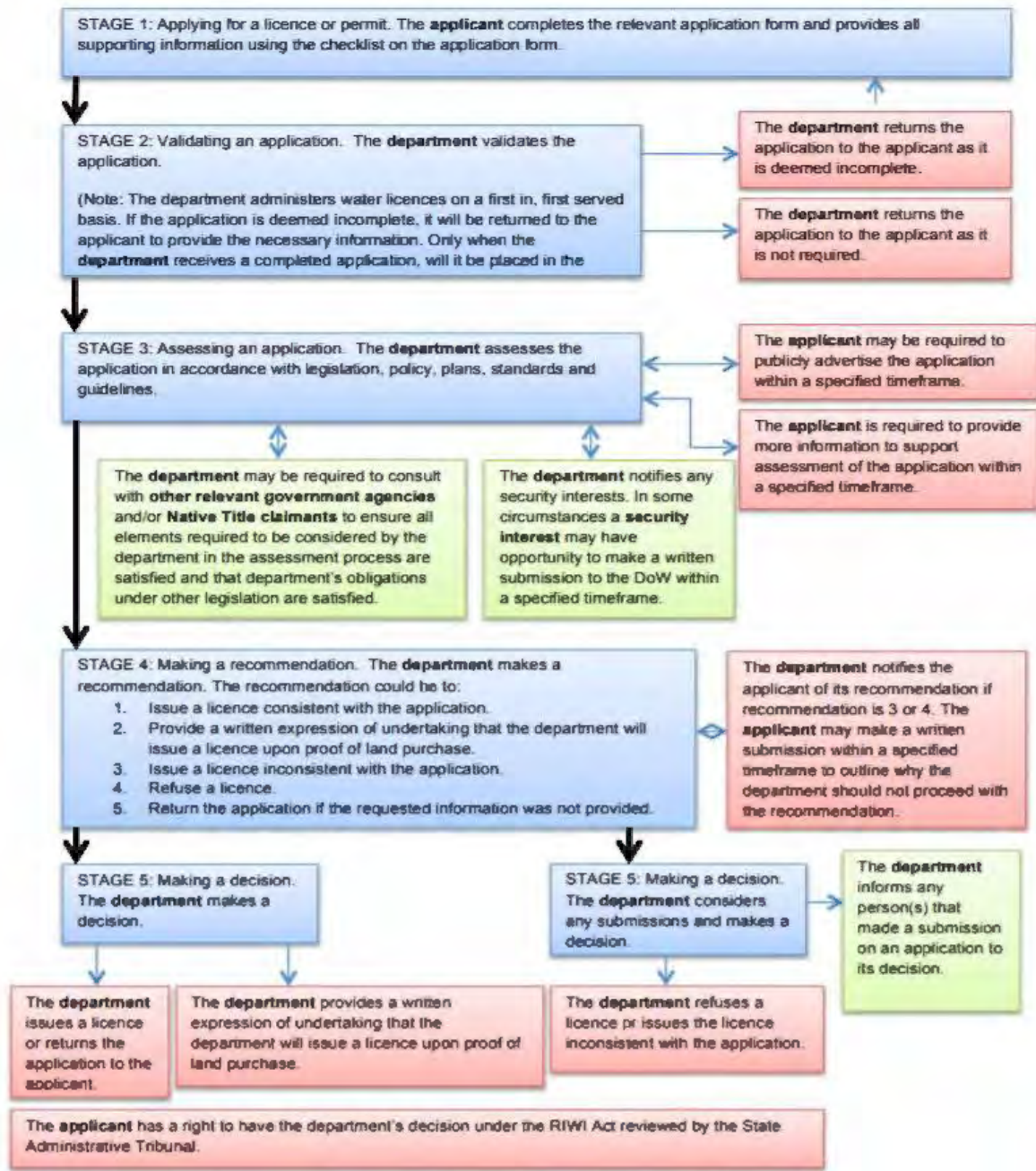
<sup>433</sup> Department of Water and Environmental Regulation, *Management of unused licensed water entitlements*, November 2019, p 4.

<sup>434</sup> Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 3.

<sup>435</sup> *ibid.*

<sup>436</sup> *ibid.*, p 4.

Figure 5. Water licensing process



[Source: Department of Water and Environmental Regulation, See: <https://www.water.wa.gov.au/licensing/water-licensing/the-water-licensing-process/water-licensing-flowchart>. Viewed 25 September 2020.]

6.25 Approximately 14 000 current licences exist for ground or surface water, covering a volume of approximately 4 000 gigalitres of water. This water use is approximately:

- 40 percent mining
- 16 percent agriculture
- 15 percent public water supplies.<sup>437</sup>

<sup>437</sup> Jason Moynihan, Acting Executive Director, Regulatory Services, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 2.

- 6.26 Licences are issued for up to 10 years. Licences may be renewed on application, subject to conditions.
- 6.27 With the exception of mining and public water supply sectors, WA is the only Australian jurisdiction that does not apply any form of cost recovery for the take and use of water. In every other state, a transaction fee is applied to the issuing of new water licences. In most states, a transaction fee is also applied to the renewal or amendment of an existing licence.<sup>438</sup>
- 6.28 An online Water Register can be used to search licencing and water availability information with regard to individual properties.<sup>439</sup> The search function can be used to determine if a current licence is associated with a property, if a licence is valid, or if water resources are available on the property in order to apply for a licence.

### Licensing exemptions—spring rights

- 6.29 Certain water is exempt from licencing requirements. Part 3 of the RIWI Act provides that the Crown owns natural waters and outlines how the use and flow of water may be controlled. Section 5C provides certain rights to access water that do not require a licence to access water. These include:
- (c) a right conferred by —
    - (i) section 9, 10, 20, 21, 22 or 25A; or
    - (ii) a local by-law of the kind referred to in section 26L(3)(d); or
    - (iii) another written law;
- 6.30 In addition, section 5 of the RIWI Act provides that Part 3 does not apply to:
- (a) the water flowing from any spring the water of which rises to the surface on land that has been granted or demised by the Crown until it has passed beyond the boundaries of the land belonging to the owner or occupier of the land on which the water so rises; or
  - (b) the water in any wetland the bed of which is on land that has been granted or demised by the Crown and is wholly within the boundaries of the land belonging to the owner or occupier of the land on which it is situated;
- unless the spring or wetland is prescribed by local by-laws as being a spring or wetland to which this Part applies.
- (2) A spring or wetland may not be prescribed as a spring or wetland to which this Part applies unless —
    - (a) taking water from the spring or wetland will, in the opinion of the water resources management committee established under Division 3C for the locality or localities in which the by-law is intended to apply, have a significant impact on the flow or level of a watercourse or wetland; and
    - (b) that committee recommends to the Minister that this Part applies to or in relation to the spring or wetland.

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<sup>438</sup> Department of Water and Environmental Regulation. See: <https://www.water.wa.gov.au/licensing/water-licensing/types-of-licenses>. Viewed 10 September 2020.

<sup>439</sup> Department of Water and Environmental Regulation. See: <https://water.wa.gov.au/maps-and-data/maps/water-register>. Viewed 25 September 2020.

- 6.31 The Committee is primarily concerned with (a), relating to spring water. In practice, this means that people may use water rising from a spring on their land without requiring a licence. This exemption is known in the community as ‘spring rights’. DWER state that the term ‘spring exemption’ more accurately reflects the intent of the RIWI Act.<sup>440</sup> The term ‘spring rights’ is the term generally used by the community. Both terms are used in this report.
- 6.32 Where a section 5 exemption applies, there is no limit to the quantity of water that a land owner/occupier can take, even within an over-allocated area.<sup>441</sup> The landowner may also build a dam to hold the spring water without requiring a licence or bed and banks permit.<sup>442</sup> Other legislation however, including that administered by a local government authority, may apply in relation to the construction of a dam or other infrastructure on a property. A list of licences and dams connected with water and dams is provided at Appendix 10.
- 6.33 Historically, as no licence is required under the RIWI Act, determinations of ‘spring rights’ have been made by self-assessment by the landowner. There is no legislative process in place for landowners to check eligibility for spring rights.<sup>443</sup> DWER advises that some landowners have incorrectly self-assessed that the spring rights exemption applies, when it does not.<sup>444</sup>
- 6.34 DWER informed the Committee that changes to the RIWI Act in 2000,<sup>445</sup> in an effort to provide greater clarity to the interpretation and application of the section 5 exemption included amendments to the definition of a ‘spring’ and the meaning of a ‘watercourse’, together with other amendments to Division 1, including section 5.<sup>446</sup>
- 6.35 Section 2 of the RIWI Act defines ‘spring’ as:
- a spring of water naturally rising to and flowing over the surface of land, but does not include the discharge of underground water directly into a watercourse, wetland, reservoir or other body of water.
- 6.36 The meaning of ‘watercourse’ is found at section 3 of the RIWI Act, it provides:
- (1) In this Act, unless the contrary intention appears — watercourse means —
- (a) any river, creek, stream or brook in which water flows;
- (b) any collection of water (including a reservoir) into, through or out of which any thing coming within paragraph (a) flows;
- (c) any place where water flows that is prescribed by local by-laws to be a watercourse, and includes the bed and banks of any thing referred to in paragraph (a), (b) or (c).
- (2) For the purposes of the definition in subsection (1) — (a) a flow or collection of water comes within that definition even though it is only intermittent or occasional; and (b) a river, creek, stream or brook includes a conduit that wholly or partially diverts it from its natural course and forms part of the river,

<sup>440</sup> Jason Moynihan, Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 8.

<sup>441</sup> Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 3.

<sup>442</sup> Jason Moynihan, Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 10.

<sup>443</sup> Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 10.

<sup>444</sup> *ibid.*, p 11.

<sup>445</sup> Refers to changes enacted as a result of the *Rights in Water and Irrigation Amendment Act 2000*.

<sup>446</sup> Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, pp 9-10.

creek, stream or brook; and (c) it is immaterial that a river, creek, stream or brook or a natural collection of water may have been artificially improved or altered.

- 6.37 The Committee notes that neither the definition of 'spring' or the meaning of 'watercourse' clearly state that the spring must rise to the surface at the head (or the start) of the watercourse for the section 5 exemption to apply. The Committee asked DWER whether sections 2, 3 and 5 clearly state that the spring is required to rise to the surface at the head of a watercourse. Mr Adam Maskew of DWER replied:

That is the advice that we have, yes.<sup>447</sup>

- 6.38 The Committee is of the view that a person reading sections 2, 3 and 5 is unlikely to understand this to be the case.
- 6.39 DWER's position that the Rights in Water and Irrigation Amendment Bill 1999 (RIWI Amendment Bill 1999) changes to sections 2, 3 and 5 clarified that the section 5 exemption only applies if the spring is at the start of a watercourse is not apparent on review of the supporting documents and the Hansard debates. The Bill's clause notes do not indicate that the effect of the changes to sections 2, 3 and 5 of the RIWI Act are to require that the spring must rise to the surface at the head (or the start) of the watercourse for the section 5 exemption to apply.<sup>448</sup>
- 6.40 The reference to spring rights in the RIWI Amendment Bill 1999 second reading speech states:

During the consultation period, many people expressed a concern over the inability to tackle the problems resulting from the use of springs. Of course, springs are jealously guarded by the landowner and any form of control must be carefully considered and properly justified. The Bill proposes that by-laws can be made to control the use of springs on private property if, and only if, the use will have a significant impact on other water resources. To ensure that proper consideration is given to the landowner's rights, controls can be introduced only when the water resources committee, the commission and the minister all agree that they are needed.<sup>449</sup>

- 6.41 The Committee notes that DWER's Water Quality Protection Note No. 53 on dam construction and operation in rural areas, dated September 2019, states that 'a water allocation licence may not be required if water is flowing from springs, until it passes beyond the boundary of the land on which the spring water rises'.<sup>450</sup> It does not state that the spring water must rise at the start of a watercourse. It does, however, advise the reader to contact DWER to confirm if they meet the requirements.
- 6.42 The Committee found that the DWER website directs readers to contact DWER for more information on the matter. The Committee suggests that the risk of DWER providing inconsistent advice may be reduced if more detail on when exemptions apply and when licences and permits are required is publicly available, rather than leaving DWER officers to provide advice and confirm that exemption requirements are met.

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<sup>447</sup> Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 2.

<sup>448</sup> Rights in Water and Irrigation Amendment Bill 1999, Clause Notes, June 1999.

<sup>449</sup> Hon Dr Kim Hames MLA, Minister for Water Resources, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 1 July 1999, p 9937.

<sup>450</sup> Department of Water and Environmental Regulation, *Dam construction and operation in rural areas*, September 2019, p 3.

6.43 In addition to the issue of incorrect self-assessments by landowners, DWER told the Committee that the advice it has given in the past on the application of section 5 exemptions has been inconsistent,<sup>451</sup> and in some cases incorrect.<sup>452</sup>

6.44 The Committee notes that when discussing section 5 exemptions in hearings, DWER officers used terms such as 'existing interpretation',<sup>453</sup> 'further understanding'<sup>454</sup> and 'updated understanding',<sup>455</sup> suggesting that the application of section 5 exemptions has evolved since the statutory changes to the RIWI Act in 2000. Mr Michael Rowe, Director General of DWER, explained at a hearing on 19 August 2020 that the advice DWER has given on section 5 exemptions has:

changed over time, based on our understanding of the legal interpretation of the legislation and how it should apply.<sup>456</sup>

6.45 In seeking to understand the trigger for this 'change over time', the Committee put this question to DWER, who explained:

Rapid uptake of licensed water entitlements in the Warren Donnelly since 2016 has resulted in most water resources becoming fully allocated. Therefore, landholders have sought to find alternative sources of water, which has included exploring water drawn from springs exempt from regulation. In working with landholders on exploring opportunities related to taking water associated with springs, the Department sought to ensure a consistent interpretation of the *Rights in Water and Irrigation Act 1914* to provide equity in decision-making.<sup>457</sup>

As part of this process, DWER maintain:

The Department has invested considerable resources since early 2018 to the existing interpretation and application of the section 5 exemption to provide greater certainty to landholders.<sup>458</sup>

6.46 It is not clear to the Committee how DWER's understanding of the legal interpretation of the legislation could change over time since the enactment of the Rights in Water and Irrigation Amendment Act 2000 (RIWI Amendment Act 2000), in the absence of further legislative changes.

6.47 It appears that the RIWI Amendment Act 2000 did not provide the intended clarity to the application of the section 5 exemption of spring rights. Further, it is concerning that it was not until subareas in the Warren-Donnelly catchment became fully allocated that DWER sought to ensure a consistent interpretation and the RIWI Act, and to correct previous incorrect advice provided by DWER to some landowners advising that they had a spring exemption when they did not.

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<sup>451</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 7.

<sup>452</sup> Department of Water and Environmental Regulation, Answer to question on notice 2 asked at hearing held 19 August 2020, dated 1 September 2020, attachment 3, p 3.

<sup>453</sup> Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 10.

<sup>454</sup> Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, Standing Committee on Environment and Public Affairs, 23 October 2019, p 14.

<sup>455</sup> Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 7.

<sup>456</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 7.

<sup>457</sup> Anthea Wu, Department of Water and Environmental Regulation, email, 11 September 2020, attachment 1, p 8.

<sup>458</sup> Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 10.

- 6.48 DWERs delay (some 16 to 18 years after the RIWI Amendment Act 2000) in addressing the issue of incorrect self-assessments and incorrect or inconsistent advice from DWER on whether a 'spring rights' or section 5 exemption applies is problematic. In the intervening period, spring rights dams have been constructed on the understanding of the land owner (either by self-assessment or based on incorrect advice from DWER) that a spring right applied, and in some cases, the opportunity for these landowners to apply for a licence to take water has been lost, as the area is now fully allocated.<sup>459</sup>
- 6.49 It is an essential feature of the rule of law that the legislation be clear, and is able to be understood by those who are bound to it.<sup>460</sup> The Committee adds that it should also be understood by those who are tasked to administer it, and consistently applied. The law should not be open to different interpretation that can change over time. The Committee is of the view that further legislative amendments are needed to be able to provide greater clarity and certainty. If it is the WA Government's intention that a spring rise to the surface at the head of the watercourse for a section 5 exemption to apply, the RIWI Act should specifically state this.
- 6.50 There is still no legislative process for landowners to check eligibility for spring rights, DWER told the Committee that it now uses the licence application process to determine whether a spring right applies. DWER recommends landowners submit an application to take water to support a formal determination of whether a section 5 exemption applies, thereby limiting the risk of incorrect self-assessment and potentially contravening the legislation. If the section 5 exemption applies to that spring, the applicant will be informed that a licence is not required to take water from that spring. Issues associated with this process are explored in the case study at paragraph 6.98.
- 6.51 DWER advised that a landowner taking water from a spring on their property will likely reduce the amount of water available downstream.<sup>461</sup> In setting and reviewing allocation limits for surface water, DWER will evaluate the volume of unlicensed (exempt) water and measure it against stream flows at various locations in the catchment.
- 6.52 The Committee enquired as to how DWER ensures that downstream supply to licence holders is not reduced by unlicensed water use upstream. DWER does not regulate unlicensed water, and suggest that a potential approach is to enact a by-law to prescribe the spring for the purposes of Part 3 of the RIWI Act, which would cause a licence to be required to take water from that spring. The decision is made by the Minister for Water on recommendation by a water resources management committee.<sup>462</sup>
- 6.53 DWER evaluates the volume of unlicensed use periodically as part of setting and reviewing allocation limits for surface water resources. This unlicensed use, which includes the take of water under section 5 exemptions, is estimated and assessed against measured streamflow at various locations in the catchment. DWER relies on geospatial datasets (e.g. hydrography, aerial photography, topography, geology) and available information on current and historical land use, seasonality and water flows.<sup>463</sup>

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<sup>459</sup> Alan Blakers, Committee Member, Western Australian Water Users Coalition, transcript of evidence, 30 October 2019, p 3.

<sup>460</sup> Law Council of Australia, *Policy statement – rule of law principles*, Canberra, March 2011, p 2.

<sup>461</sup> Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 2.

<sup>462</sup> *ibid.*, p 12.

<sup>463</sup> *ibid.*, p 2.

## Trade and transfer

- 6.54 The RIWI Amendment Bill 1999 introduced a range of reforms, including the ability for a licence holder to trade water:

Licences are, and will remain, the primary means of specifying commercial entitlements to use water. Under the reforms a licence will become a negotiable asset that the holder can trade solely at his or her discretion, provided this causes no environmental harm or other problems. Trading will give water users the opportunity to manage their supply of water, and match it to their needs. This new opportunity for agri-business will allow irrigators to increase their commercial returns and their security. Markets are already operating in South Australia, New South Wales, Victoria and among Western Australian farmers in the South-West Irrigation Cooperative. Trading will be introduced to an area only when the commission and the water resources committee agree it is ready and wants the trading. The approval of the Water and Rivers Commission or the water resources committee will be required for the transfer of a licence and local by-laws may be made to prohibit or govern the transfer. The introduction of licence trading, if not properly controlled, could create conditions favourable to speculation. To manage this, controls will be placed on who can hold a licence.<sup>464</sup>

- 6.55 Trading and agreements allow unused water to be moved to other properties in the same subarea as demand requires.<sup>465</sup>

- 6.56 The DWER website explains:

A **transfer** takes place when a licence to take water is permanently transferred to another person and the water will continue to be taken from the same location. For example, a transfer could take place if there is a change in property ownership.

A **trade** takes place when a water entitlement, or part of an entitlement, is permanently traded to another person and the water will be taken from another location and potentially use it for a different purpose. Trades typically occur in fully allocated water resource areas where new water entitlements are no longer available.

An **agreement** is a form of lease and occurs via the temporary assignment of a licensed water entitlement, or part of an entitlement, by a licence holder to another party. The water may be used at the same or a different location. Agreements cannot exceed the term of the original licence.<sup>466</sup>

- 6.57 When selling the land holding (property), the licence holder is responsible for advising DWER of the impending change in ownership of the land. Prior to, or within 30 days of settlement, licence holders may apply, for a fee, to transfer the licence to the new property owner, trade the entitlement to another party or amend the licence for use on their new property.<sup>467</sup>

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<sup>464</sup> Hon Dr Kim Hames MLA, Minister for Water Resources, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 1 July 1999, p 9936.

<sup>465</sup> Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 7.

<sup>466</sup> Department of Water and Environmental Regulation. See: <https://www.water.wa.gov.au/licensing/water-licensing/transfers,-trades-and-agreements>. Viewed 25 September 2020.

<sup>467</sup> Department of Water and Environmental Regulation. See: <https://www.water.wa.gov.au/licensing/water-licensing/transfers,-trades-and-agreements#faq6.2>. Viewed 10 September 2020.



- 6.58 Notwithstanding that water licence holders pay no licence fee and pay no charge to take water, licence holders are able to trade water licences for profit.<sup>468</sup> The financial value of the trade, transfer or lease is negotiated between the buyer and seller.<sup>469</sup>

### Water Allocation Plans

- 6.59 Division 3D of the RIWI Act enables the Minister for Water to prepare regional, sub-regional and local water management plans. Consultation with the relevant water resources management committee is required.
- 6.60 Water management plans outline how much water can be taken from groundwater and surface water resources, while safeguarding the sustainability of the resource and protecting the water-dependent environment.
- 6.61 DWER uses water allocation plans to guide individual licensing decisions so that they collectively contribute to economic, social and environmental outcomes. Water allocation plans do not exist for all water resources across the state—only in those areas where water is in high competition or extensively used. DWER estimates that there are between 20 and 30 active water allocation plans in WA.<sup>470</sup>
- 6.62 The plans allow for a gradual reduction of over-allocation:
- Through the water allocation plan, we can try to set a pathway forward to reduce the allocation over time. If the system is already fully allocated and there is over-allocation and people have not used their water for a period of time, we might bring that water back into the pool, effectively, and basically retire that allocation.<sup>471</sup>
- 6.63 Water allocation plans are developed with ‘extensive consultation with water users in the area’, to ensure rules and principles are locally appropriate:
- You can imagine that the rules that apply to extracting surface water in the south west will potentially be very different from what they are in the Kimberley, for example, and, similarly, groundwater extraction rules might be very different on the Gnangara mound than other parts of the south west are.<sup>472</sup>
- 6.64 Water allocation plans typically last for 10 years, and DWER will typically review the objectives every two to three years:
- While the plans themselves do not necessarily change fundamentally at that time, the major review period is the opportunity for when plans can be updated, and that flows into licensing decisions and local rules that we might set.<sup>473</sup>
- 6.65 A process governs community consultation regarding new or amended water allocation plans:
- The former Department of Water’s *Water allocation planning in Western Australia: A guide to our process 2011* outlines how community consultation is a critical part of all stages of water allocation planning.

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<sup>468</sup> Department of Water and Environmental Regulation. See: <https://www.water.wa.gov.au/licensing/water-licensing/types-of-licenses>. Viewed 10 September 2020.

<sup>469</sup> Department of Water and Environmental Regulation. See: <https://www.water.wa.gov.au/licensing/water-licensing/transfers,-trades-and-agreements#faq6.2>. Viewed 10 September 2020.

<sup>470</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 3.

<sup>471</sup> *ibid.*, p 4.

<sup>472</sup> *ibid.*, p 3.

<sup>473</sup> *ibid.*

Consultation throughout the process of developing or altering a plan also involves local water resource management or water advisory committees where these are in place. Once a draft plan is developed, it is released for public comment. Submissions on the draft plan are invited and used to inform the final plan.<sup>474</sup>

## Reform

- 6.66 In August 2018, the WA Government approved drafting on the Water Resources Management Bill. The proposed Bill will consolidate the six current Acts regulating water into a single Water Resources Management Act.<sup>475</sup>

It is time to stop patching the existing Acts and rebuild the legislative framework for water management.<sup>476</sup>

- 6.67 The reform is required to simplify what has become a complicated and convoluted legislative environment:

Continuous amendment over the decades has resulted in complicated, and in some cases convoluted legislation that has not kept pace with important improvements in modern water resource management.

The State Government is working to reform water legislation, policy and administrative processes. This will deliver new water resources management and water services legislation that is flexible, progressive and more capable of managing water today and in the future.

The legislative reform will support Western Australia's growth and development and protect the environment, even in a changing climate.<sup>477</sup>

- 6.68 The Director General of DWER was unable to answer the Committee's questions about whether the proposed Water Resources Management Bill will increase certainty for landowners, with DWER claiming drafting instructions are cabinet-in-confidence.<sup>478</sup> The Bill is currently with Parliamentary Counsel's Office and subject to change. DWER advised the overarching policy intent is to give effect to the intention of the National Water Initiative:

In essence, the principles are the same, which is you need to understand your resources on a case-by-case basis; you need to have a plan in place that sets out allocation limit that will be managed to. Then you need a system of entitlements that exist within that system that makes sense appropriate to that system.

Currently, we have water licences. They are the main form of instrument that we use to allocate water. The proposal into the future might be that new water resources management legislation could provide for a consumptive pool with, effectively, a share of the entitlement allocated on a proportionate basis to water users. Again, that is subject to the bill being finalised and developed.<sup>479</sup>

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<sup>474</sup> Department of Water and Environmental Regulation, Answer to question on notice 1 asked at hearing held 17 February 2020, dated 4 March 2020, p 1.

<sup>475</sup> Department of Water and Environmental Regulation. See: <http://www.water.wa.gov.au/legislation/water/water-resource-management-legislation>. Viewed 10 September 2020.

<sup>476</sup> Department of Water, *Securing Western Australia's water future*, August 2013, p 4.

<sup>477</sup> Department of Water and Environmental Regulation. See: <http://www.water.wa.gov.au/legislation/water>. Viewed 10 September 2020.

<sup>478</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 5 and Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 8.

<sup>479</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 5.

6.69 While noting that the below is subject to change through the parliamentary process, DWER told the Committee that its current policy position in relation to the Water Resources Management Bill includes:

- enhanced security with respect to water entitlements in the form of statutory water allocation plans
- spring and riparian rights to remain as present under the RIWI Act
- introduction of variable water allocation limits and variable licenced water entitlements.<sup>480</sup>

6.70 DWER advise that the reforms will align WA with the principles of the National Water Initiative (NWI), a blueprint for water reform, which was agreed in 2004 by the Council of Australian Governments.<sup>481</sup> The NWI is a shared commitment to increase the efficiency of water use across Australia. Under the NWI, State and Territory governments will:

- prepare comprehensive water plans
- achieve sustainable water use in over-allocated or stressed water systems
- introduce registers of water rights and standards for water accounting
- expand trade in water rights
- improve pricing for water storage and delivery
- better manage urban water demands.<sup>482</sup>

### **Proprietary rights associated with licences**

6.71 The Committee heard that licences are not 'real property', legal estates, nor legal interests in land,<sup>483</sup> and are therefore not recognised under the land titles system:

There are no certificates of titles for water. So it would not be possible to link information about fishing licences or any other water licences to land titles, or through the PIRs [Property Interest Reports].<sup>484</sup>

6.72 The Committee also heard that licences are not property at all. Timothy Houweling, Director of Cornerstone Legal, questioned this particular Inquiry term of reference by referring to section 50(2)(c) of the *Interpretation Act 1984*:

A government has a right to issue a licence. A licence is not considered to be property. Perhaps under the federal government fair and just terms, we can bring that within compensation but under the Interpretation Act, government agencies are able a grant licence on the terms that are reasonable and the exercise of the discretion and it can also cancel a licence, and there is no requirement for the payment of compensation in those circumstances. That particular term of reference has contained within it an assumption that may not be entirely correct.<sup>485</sup>

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<sup>480</sup> Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 9.

<sup>481</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 5.

<sup>482</sup> Department of Agriculture, Water and the Environment. See: <https://www.agriculture.gov.au/water/policy/nwi>. Viewed 10 September 2020.

<sup>483</sup> Submission 69 from Landgate, 31 July 2019, p 5.

<sup>484</sup> *ibid.*

<sup>485</sup> Timothy Houweling, Director, Cornerstone Legal, transcript of evidence, 18 November 2019, p 5.

6.73 The rights associated with water are notoriously difficult to define. Water is a common good resource, and all natural water resources in WA are vested in the Crown.<sup>486</sup> Definition of these rights is further complicated by the variable nature of the resource.<sup>487</sup>

6.74 While landowners who hold water entitlements have rights, there has been significant debate about whether these rights or entitlements are proprietary rights. The Minister for Environment said that rights in water must be distinguished from ownership:

Water licences issued under the *Rights in Water and Irrigation Act 1914* grant the right to take water for a particular use, but do not give ownership of water to licensees.<sup>488</sup>

6.75 In *ICM Agriculture Pty Ltd v Commonwealth* (2009), the High Court found that the reduction of water entitlements does not constitute the acquisition of property.<sup>489</sup> The case concerned the replacement of bore water licences with aquifer access licences. This resulted in a reduction of the amount of groundwater the plaintiffs were entitled to abstract. Although there was debate on this issue, French CJ, Gummow and Crennan JJ considered that the licences were not proprietary:

Where a licensing system is subject to Ministerial or similar control with powers of forfeiture, the licence, although transferable with Ministerial consent, nevertheless may have an insufficient degree of permanence or stability to merit classification as proprietary in nature.<sup>490</sup>

6.76 On the other hand, Hayne, Kiefel and Bell JJ considered otherwise:

It may readily be accepted that the bore licences that were cancelled were a species of property. That the entitlements attaching to the licences could be traded or used as security amply demonstrates that to be so.<sup>491</sup>

6.77 The 'common' nature of water is a further limitation on proprietary rights. In the ICM case, French CJ, Gummow and Crenna JJ stated that:

the groundwater in the [Groundwater System] was not the subject of private rights enjoyed by [the plaintiffs]. Rather ... it was a natural resource, and the State always had the power to limit the volume of water to be taken from that resource.<sup>492</sup>

6.78 DWER confirmed that a water allocation licence does not give rise to a 'property right' in water:

The State grants rights to access the water resources, through the issuing of water licences under section 5C of the RiWI, which allows licence holders to take water under the RiWI Act. A water licence holder and water access entitlement holder does not 'own' the water. They only have the right to access the water.

A property right is a right to an interest or thing which is legally capable of ownership and which has value. A licence granted under section 5C of the RiWI Act

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<sup>486</sup> *Rights in Water and Irrigation Act 1914* s 5A.

<sup>487</sup> D Brennan and M Scoccimarro, 'Issues in defining property rights to improve Australian water markets', *The Australian Journal of Agricultural and Resource Economics*, 2002, vol. 43, 1, p 70.

<sup>488</sup> Hon Stephen Dawson MLC, Minister for Environment, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 June 2019, p 4019.

<sup>489</sup> See *ICM Agriculture Pty Ltd v the Commonwealth* [2009] HCA 51 and *Arnold v Minister Administering the Water Management Act 2000* [2010] HCA 3.

<sup>490</sup> *ICM Agriculture Pty Ltd v the Commonwealth* [2009] HCA 51, p 25.

<sup>491</sup> *ibid.*, p 55.

<sup>492</sup> *ibid.*, p 27.

is a statutory entitlement, rather than a property right, as it does not grant ownership of anything. Rather, it is a licence issued under the statute which allows a person to take an action which would otherwise be prohibited by the RiWI Act (i.e. take water).<sup>493</sup>

- 6.79 However, as outlined at 6.54, licence holders are able to trade their water entitlements for a profit. This has caused some in the community to view water licences as a property right. The Committee notes that the ability of the licensee to trade water licences and certain other government issued licences in exchange for a monetary payment sits somewhat awkwardly with the WA Government retaining the proprietary right in the natural resource.
- 6.80 The Committee notes that water licences are not property in the same way that 'real property', such as land, is. However, water licences have proprietary characteristics such as exclusivity and transferability, to a degree. As with fishing licences (see Chapters 7 and 8), the Committee considers that water licences exist on the continuum of property interests.
- 6.81 Proprietary or otherwise, entitlements and rights in water do exist. Some suggest that such rights are not assigned an adequate level of priority:
- When determining water policy within a property rights framework, the key principle must be the protection of existing rights to water. It is unacceptable for current users of water to have the rules changed and massive additional charges imposed or complete withdrawal of water when they have made investment decisions based on current rights.<sup>494</sup>
- 6.82 In a working paper on the case of the Gnamagara groundwater system, University of Western Australia academics James Skurray, Ram Pandit and David Pannell found that the rights associated with water in WA are 'conditional, temporary and vulnerable to amendment'.<sup>495</sup>
- 6.83 Achieving a balance between preserving water and recognising landowners water rights is important to farmers, who require a level of certainty to plan for the future:
- Farmers are increasingly uncertain about their future and their rights as landholders. Successive governments have done little to allay concerns or clear the way. Property rights of farmers must be respected in relation to government decisions affecting land and water entitlements to give them confidence to invest and run a farm business.<sup>496</sup>
- 6.84 The NWI has attempted to deliver some certainty in this space by providing statutory access entitlements, which possess some key characteristics of property rights—namely, exclusivity, transferability and enforceability (see paragraph 2.7).<sup>497</sup>

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<sup>493</sup> Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 5.

<sup>494</sup> Institute of Public Affairs, *Property rights in Western Australia: time for a changed direction*, report prepared by Louise Staley, July 2006, p 6.

<sup>495</sup> University of Western Australia, School of Agricultural and Resource Economics, *Institutional impediments to groundwater trading: the case of the Gnamagara groundwater system of Western Australia*, report prepared by James Skurray, Ram Pandit and David Pannell, November 2011, p 2.

<sup>496</sup> Submission 6 from WAFarmers, 18 July 2019, p 2.

<sup>497</sup> Australian Law Reform Commission, Report #129, *Traditional rights and freedoms – encroachment by Commonwealth laws*, 1 March 2016, p 472.

## Current issues

### Encouraging efficiency and equity in water use

- 6.85 DWERs operational policy on water entitlement transactions for WA states that the trading of water entitlements is an effective means for optimising the benefits of using water.<sup>498</sup> It also notes that transactions are most common where water is fully allocated.
- 6.86 Where a water entitlement is unused, typically over a three-year period, DWER will look to recoup that water and amend the quantity on the licence.<sup>499</sup> This creates an incentive for landowners to lease their entitlements, rather than lose the water.
- 6.87 The Committee, while acknowledging that holders of water licences value the right to trade water, expresses its concern that in fully allocated or over-allocated subareas, the right to trade water may mean that licence holders are able to hold onto their full water allocation even if it is in excess to his/her needs rather than have the excess or unused water returned to the 'pool' for distribution,<sup>500</sup> thereby possibly preventing new landowners to the subarea from securing a water licence and realising the full agricultural potential of their property.
- 6.88 The Committee asked DWER if the system of trading arrangements encourages over-use or waste of water by those with a water allocation, who wish to avoid their allocation being reduced:
- I guess the legislation provides for trading arrangements. It is not well used in the south west of the state. It is surprising to me that it is not, to be honest. It exists as an opportunity and I do not why people may or may not be doing it. It is up to them. I guess we do not see evidence of hoarding in that sense, but the opportunity exists for people to move water around and to make money from it—the legislation clearly provides for that.<sup>501</sup>
- 6.89 In terms of why it has no reliable evidence of 'water hoarding', DWER advised:
- The cost to a licensee of pumping water would also act as a deterrent to poor water use efficiency practices, and can potentially impact negatively on crop production.<sup>502</sup>
- 6.90 The Committee also asked whether the current 'first in-first served' system of water allocation delivers a fair and equitable outcome for owners of agricultural land, particularly in fully allocated or over-allocated subareas:
- The Department undertook a review of this policy in 2011 with stakeholders. Feedback at that time was that it was considered the most fair and transparent way in which water could be allocated. However, depending on the circumstances, the Department may apply a different approach to allocating additional water resources in the future.<sup>503</sup>
- 6.91 When questioned as to why available water cannot simply be distributed between all properties in a subarea on the basis of size and agricultural use, DWER responded:

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<sup>498</sup> Department of Water and Environmental Regulation, *Operational policy on water entitlement transactions for Western Australia*, November 2010, p v.

<sup>499</sup> Department of Water and Environmental Regulation. See: <https://www.water.wa.gov.au/licensing/water-licensing/transfers,-trades-and-agreements#faq6.10>. Viewed 10 September 2020.

<sup>500</sup> Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 14.

<sup>501</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 11.

<sup>502</sup> Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 4.

<sup>503</sup> *ibid.*, p 5.

Such an approach may be applicable in a 'greenfields' scenario. However, to do so where high levels of pre-existing development exists is impractical due to varying catchment flow responses and may adversely affect existing users' licences to take water. Allocation planning for water resources acknowledges pre-existing use and development when setting local water allocation planning objectives for the catchment area.

In addition, water is generally unevenly taken and available across a catchment due to clearing, soil types, water salinity, stream networks, groundwater systems (including their connectivity) and proposed usages. Land use changes over time.<sup>504</sup>

- 6.92 The Committee heard evidence that in fully allocated subareas, when water becomes available it is highly contested.<sup>505</sup> The 'first in-first served' methodology means landowners need to have an application ready to lodge before availability of the water is advertised to have any hope of being 'first in' to secure a water licence.
- 6.93 A lack of access to water in over allocated or fully allocated water subareas is restricting expansion of horticultural businesses and growth of the agriculture industry in the Warren-Donnelly catchment.<sup>506</sup> Witnesses called for greater transparency in DWERs modelling and calculation of available water in subareas and catchments, and the quantity of water needed to sustain the environment.<sup>507</sup>
- 6.94 The Committee asked DWER whether it assesses 'need' when considering water licence applications:
- The department considers the information provided with the application against the matters it considers relevant consistent with Schedule 1 Clause 7(2) of the RIWI Act having due regard to the size of the property, the type of agricultural use and the reasonable water needs for the proposed development.<sup>508</sup>
- 6.95 On how water within a subarea becomes over-allocated, DWER told the Committee:
- Over-allocation occurs when the taking of water exceeds the availability of water from a water resource. Climate change is a key factor, as rainfall runoff/infiltration has significantly reduce in recent years, which impacts on the sustainable yield of the water resource and may result in over-allocation where competition for water is high.<sup>509</sup>
- 6.96 DWER added:
- Over-allocation can occur as a consequence of a number of mechanisms which may include where take and use is under-estimated or previously unidentified or changes in exempt status.<sup>510</sup>

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<sup>504</sup> Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 3.

<sup>505</sup> Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 7.

<sup>506</sup> Tyne Logan, 'Farmers in a town with annual rainfall of 981mm face a shortage of water for irrigation', *ABC News*, 18 September 2018.

<sup>507</sup> Alan Blakers, Committee Member, Western Australian Water Users Coalition, transcript of evidence, 30 October 2019, p 4.

<sup>508</sup> Anthea Wu, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 5.

<sup>509</sup> *ibid.*, p 3.

<sup>510</sup> *ibid.*

- 6.97 Concerned with the drying climate and what this may mean for landowners into the future, the Committee asked whether DWER actively promotes efficient use of water by farmers such as drip irrigation systems:

The department promotes the adoption of water efficiency measures. Irrigation efficiency, engagement with landowners is undertaken by the Department of Primary Industries and Regional Development.<sup>511</sup>

#### **FINDING 24**

Access to water in fully allocated or over-allocated water subareas is restricting horticultural activity in these subareas.

#### **FINDING 25**

Water security is a real and growing issue in a drying climate.

#### **Case study—water in the Warren-Donnelly area**

- 6.98 The Committee heard from the WA Water Users Coalition (Coalition), who are concerned that DWER have acted inconsistently, without transparency and failed to provide clarity in relation to water allocation in the Manjimup area. The Coalition formed in the late 1990s to respond to the RIWI Amendment Bill 1999, which allowed the sharing of water that can be taken under riparian rights and the imposition of controls on springs and wetlands on private land.<sup>512</sup>

#### *Background*

- 6.99 The Warren-Donnelly area comprises the Warren River catchment area and the Donnelly River catchment area.
- 6.100 In 2008, DWER began working on a surface water allocation plan for the Warren-Donnelly area after a study indicated that some rivers may be fully or over-allocated:

This highlighted that individual licence assessments were no longer enough to manage water use effectively at a subarea level and allocation limits needed to be introduced.<sup>513</sup>

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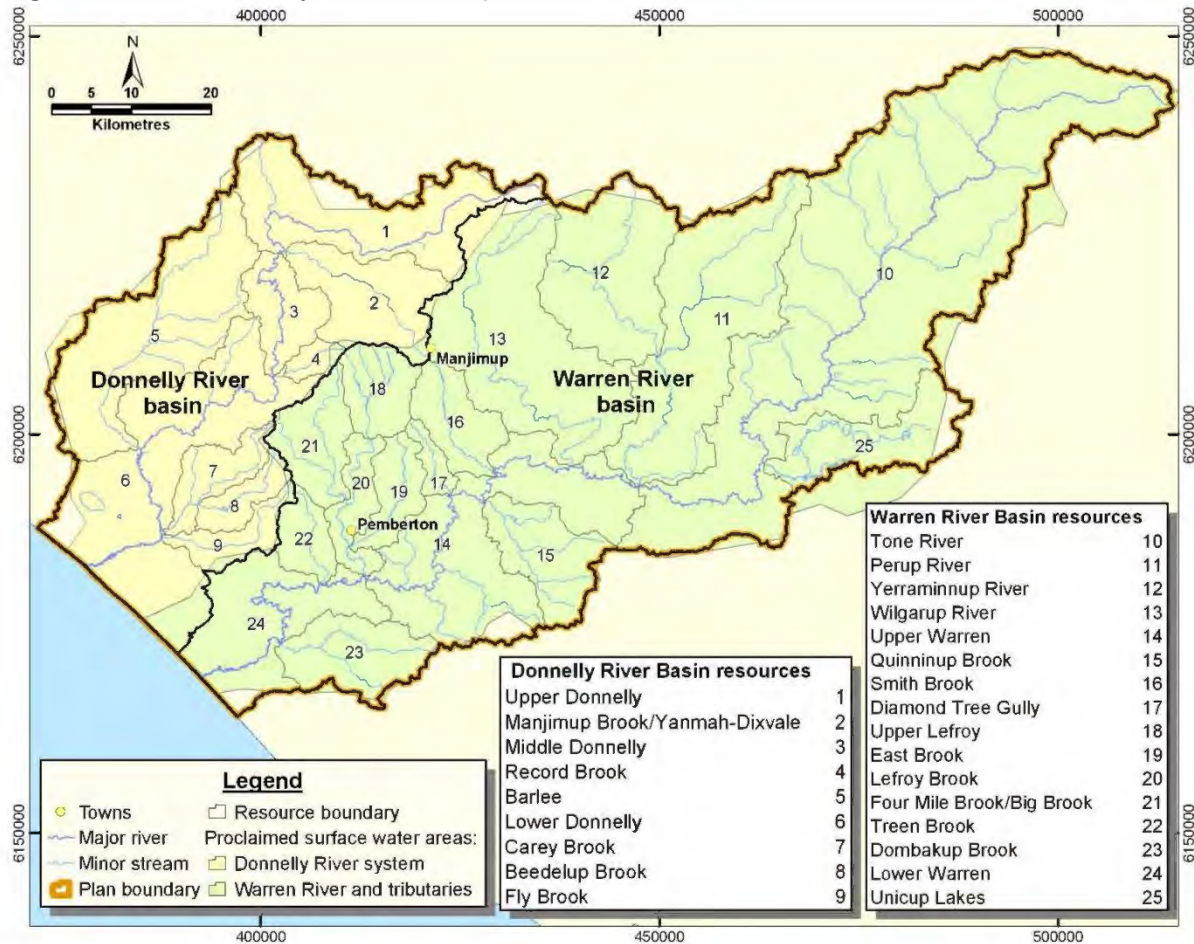
<sup>511</sup> *ibid.*, p 6.

<sup>512</sup> Submission 33 from Western Australian Water Users Coalition, 30 July 2019, p 1.

<sup>513</sup> Department of Water and Environmental Regulation. See: <https://www.water.wa.gov.au/planning-for-the-future/allocation-plans/south-west-region/warren-donnelly-surface-water-allocation-plan>. Viewed 10 September 2020.



Figure 6. Warren-Donnelly surface water plan area and subareas



[Source: Department of Water and Environmental Regulation. See: <http://www.water.wa.gov.au/planning-for-the-future/allocation-plans/south-west-region/warren-donnely-surface-water-allocation-plan>. Viewed 10 September 2020.]

- 6.101 The Warren-Donnelly Surface Water Allocation Plan (Plan) came into effect in 2012, introducing allocation limits and formalising how DWER would manage and allocate surface water in the area.
- 6.102 The Warren-Donnelly catchment is divided into 25 surface water subareas. The subarea is referred to as a surface water resource.<sup>514</sup> The Plan establishes the total amount of water that can be taken from a water resource without compromising reliability to existing landowners or damaging the environment.<sup>515</sup>
- 6.103 DWER allocates water up to the allocation limits for each of the surface water subareas in accordance with the licencing and allocation approach set out in Chapter 4 of the Plan on the basis of ‘first in-first served’. Once a subarea is fully allocated, DWER will refuse applications for new entitlements (or increases to existing entitlements) for high reliability water. Other options such as trading or transfers and assessing lower reliable water may be available.<sup>516</sup>
- 6.104 The Plan states:

<sup>514</sup> Department of Water and Environmental Regulation, *Warren-Donnelly Surface Water Allocation Plan*, April 2012, p 3.

<sup>515</sup> *ibid.*, p 9.

<sup>516</sup> *ibid.*, p 15.

Under this plan, there is enough water allocated to meet current use and the highest estimated demand projected by CSIRO for the whole plan area to 2030 (39.8 GL/year). However, in five irrigated subareas there is only limited water available now and local demand is likely to exceed allocation limits.<sup>517</sup>

- 6.105 At the time of the release of the Plan, of the almost 69GL available for self-supply, only 37.5GL or 55 percent was allocated. As at January 2016, only 42.8GL or 62 percent of available water for licencing has been allocated. In addition, approximately 10GL of water was allocated under variable take licences.<sup>518</sup>
- 6.106 This has resulted in an increase in the subareas where water is no longer available. In the Plan, only two of the nine subareas in the Donnelly River catchment and three of the 16 subareas in the Warren River catchment were fully allocated or had no water available for licencing. Today, this has doubled in the Donnelly River catchment to four subareas and tripled in the Warren River catchment to nine subareas.<sup>519</sup>

#### *Southern Forests Irrigation Scheme*

- 6.107 In 2015, the WA Government contributed \$3.6 million to the first stage of the Southern Forests Water Futures project. The Southern Forest Irrigation Scheme (SFIS) began as a State initiative to explore what can be done to provide water security to the Manjimup-Pemberton region against the impacts of climate change.<sup>520</sup>
- 6.108 The proposed SFIS involves taking water from the forested areas of the Upper and Middle Donnelly subareas and Record Brook (which will be made into a reservoir with a storage capacity of 15GL) to irrigate land through a 250km pipeline distribution network that will supply water to horticultural and agricultural producers who have purchased a water entitlement under the SFIS:<sup>521</sup>

It comprises the harvesting of peak flows that are over and above the environmental requirements of the Donnelly River and storing in an off stream storage dam on Record Brook that is then gravity fed to farmers through an integrated underground pipe system.

This type of irrigation system is new to Western Australia but is common practice in Tasmania as it provides low impact to the environment and water reliability to the farmers.<sup>522</sup>

- 6.109 The Manjimup Brook/Yanmah-Dixvale subarea has been declared to be fully-allocated by DWER.<sup>523</sup> Landowners in the Manjimup Brook/Yanmah-Dixvale subarea see water rushing through the waterways within the subarea and are frustrated when told by DWER that no new water licences or variable take licences will be issued as the available water within the

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<sup>517</sup> *ibid.*, p 13.

<sup>518</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 8 September 2020, attachment 1, p 1.

<sup>519</sup> *ibid.*

<sup>520</sup> Ralph Addis, Director General, Department of Primary Industries and Regional Development, letter, 10 June 2020, p 1.

<sup>521</sup> Department of Primary Industries and Regional Development. See: <https://www.agric.wa.gov.au/waterforfood/southern-forests-irrigation-scheme>. Viewed 20 September 2020.

<sup>522</sup> Ralph Addis, Director General, Department of Primary Industries and Regional Development, letter, 10 June 2020, p 1.

<sup>523</sup> Department of Water and Environmental Regulation, Answer to question on notice 2 asked at hearing held 19 August 2020, dated 1 September 2020, attachment 3, p 2.

subarea has been fully allocated. They believe they are being denied access to the water in order to supply water for the SFIS.<sup>524</sup>

6.110 The SFIS proposal is currently with the EPA for assessment. The estimated publish date for the EPA assessment report is July 2021. DPIRD is the lead agency for the SFIS project, with licencing managed by DWER.<sup>525</sup>

The amount that can be pumped will be controlled by strict licencing conditions imposed by DWER that ensures that water taken will not have significant downstream environmental impacts.<sup>526</sup>

6.111 DPIRD told the Committee that while there are approximately 452 water licences in the Warren-Donnelly catchment, only around 238 growers (horticultural businesses) are considered to be within 2 kilometres of the SFIS pipeline infrastructure.<sup>527</sup> This is considered to be the total number of growers that could potentially (water limiting) connect to the SFIS. Of the 238, 70 growers have already signed up:

which represents around a 30 per cent take up by eligible growers and a take up of more than 80 per cent of the available water.<sup>528</sup>

6.112 The SFIS will be owned and operated by the Southern Forests Irrigation Co-operative Ltd (SFI Co-operative), and all scheme users (people who have purchased a water entitlement under the SFIS) will be members of the co-operative.<sup>529</sup>

6.113 The SFI Co-operative will determine how stored water is distributed to members, and it is likely that members will trade any of their unused water between themselves.<sup>530</sup> The SFI Co-operative will administer water trading within the SFIS.<sup>531</sup>

6.114 The Committee asked DPIRD about the likelihood of the SFIS being used for water speculation, water banking, and water trading outside the SFIS. DPIRD stated:

- water trading outside the SFIS is unlikely, unless water sources are hydraulically linked
- water trading is subject to member provisions under the *Co-operatives Act 2009* and being a land owner within the SFIS area which will protect against water speculation and water banking
- while it is possible that rules could change to permit outside trading in the future, the requirement for new infrastructure to access the water would significantly influence the price
- due to the 'closed loop' nature of the water supply and relatively small volume of water available, DPIRD do not expect trading outside the SFIS to be an attractive proposition to water speculation.<sup>532</sup>

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<sup>524</sup> Hon Terry Redman MLA, letter to Standing Committee on Environment and Public Affairs, 22 August 2020, p 1.

<sup>525</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 11.

<sup>526</sup> Ralph Addis, Director General, Department of Primary Industries and Regional Development, attachment to letter, 10 June 2020, p 2.

<sup>527</sup> *ibid.*, p 1.

<sup>528</sup> *ibid.*

<sup>529</sup> *ibid.*, p 3.

<sup>530</sup> *ibid.*, p 2.

<sup>531</sup> *ibid.*

<sup>532</sup> *ibid.*, pp 2-3.

6.115 Interestingly, while stating it would be unlikely that the SFIS would not use all its water entitlement, DPIRD advised in the event that the SFIS does not use all its water entitlement, the unused water will continue to flow out to the ocean.<sup>533</sup> It will not make any further water available to other subareas unless the available water is pumped, stored and distributed in a similar manner as the SFIS:

If no water is pumped from the Donnelly River then unused water will continue to flow out to the ocean. It will not make any further water available to other catchments unless the available water is pumped, stored and distributed in a similar manner as the SFIS.<sup>534</sup>

6.116 Both DPIRD and DWER are of the understanding that the 'property' in water remains with the State. The SFI Co-operative will licence water through DWER.<sup>535</sup> Because the licence is subject to ongoing review and conditions, it is possible that DWER could suspend or cancel the licence in certain circumstances.<sup>536</sup> While DWER stated that shareholders have no proprietary right to SFIS water, DPIRD noted:

The licence is not absolute property – it contains some elements of perpetuity and transferability, but it does not provide exclusivity in terms of access to the water resource.<sup>537</sup>

## **FINDING 26**

Under the proposed Southern Forests Irrigation Scheme, the Southern Forests Irrigation Co-operative will licence water from the Department of Water and Environmental Regulation and distribute water between shareholders, who may then trade water amongst themselves.

6.117 The SFIS has generated significant discord between farmers in the Warren-Donnelly area. According to the Coalition:

The majority of rural landowners in the Warren-Donnelly district in the Shire of Manjimup will not benefit from the Southern Forest Irrigation Scheme. Many farmers run livestock only and most private funded self-supply irrigators do not require any water from the Southern Forest Irrigation Scheme.

The Western Australian Water Users Coalition has concerns on many issues including the absence of consultation in regards to the recognition to the probity of the Torrens title system that are emerging with the Southern Forest Irrigation Scheme proposal.<sup>538</sup>

6.118 Some landowners in the Manjimup Brook/Yanmah-Dixvale subarea (a fully allocated subarea), opposed to the SFIS, argue that the scheme is taking away water that they would otherwise be able to access.<sup>539</sup> They maintain that they should not have to purchase a water entitlement under the SFIS to access water that they would otherwise have been able to access without the additional cost of purchasing a water entitlement under the SFIS. Further, that water from the Donnelly River catchment should not be lost to landowners in that catchment in favour of landowners in the Warren River catchment. They see water rushing

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<sup>533</sup> *ibid.*, p 2.

<sup>534</sup> Ralph Addis, Director General, Department of Primary Industries and Regional Development, letter, 10 June 2020, attachment 1, p 2.

<sup>535</sup> *ibid.*, p 1.

<sup>536</sup> *ibid.*, p 2.

<sup>537</sup> *ibid.*, p 1.

<sup>538</sup> Submission 33 from Western Australian Water Users Coalition, 30 July 2019, p 2.

<sup>539</sup> Hon Terry Redman MLA, letter to Standing Committee on Environment and Public Affairs, 22 August 2020, p 1.

through the waterways within the subarea and are frustrated when told by DWER that no new water licences will be issued as the water available for licencing in the subarea is fully allocated.<sup>540</sup> In addition, there is a moratorium on the issue of variable take licences.<sup>541</sup> Some believe that they are being denied access to the water in order to supply water for the SFIS.<sup>542</sup> DPIRD and DWER refute this.<sup>543</sup>

- 6.119 DPIRD and DWER maintain that, based on their modelling, the water to supply the SFIS is coming from the forested areas in the Upper Donnelly and Middle Donnelly subareas, not the Manjimup Brook/Yanmah-Dixvale subarea.<sup>544</sup>
- 6.120 Some landowners have questioned the accuracy and reliability of DWER modelling and some of the assumptions made as part of the modelling.<sup>545</sup> The Committee observed that DWER may not have enough gauging stations and some are not in the best locations to best inform the modelling.
- 6.121 The Committee questioned the modelling in the region, given that there appears to be no gauging stations in the Upper Donnelly:

My simple knowledge of the way the models are developed is that we have gauging stations right through the catchment and they may be temporary in nature or we have some very long-term ones established in the 1950s and 1960s. In the model we have, those gauging stations are right around the state, we can use them to reference the land-use types and things like that. So, based on the information that is collected, we can understand the water runoff based on the catchment type, and that is how the model is built and calibrated to the observed records.<sup>546</sup>

- 6.122 The Committee questioned whether with no gauging stations in the Upper Donnelly and a single temporary gauging station located to one side of the Manjimup Brook/Yanmah-Dixvale subarea, which DWER indicates it intends to make permanent, provides DWER with sufficient information for its modelling, and whether a gauging station at Sears Road, as requested by the community, would provide greater clarity:

In the Manjimup subarea, the gauging station that you referred to us making permanent is actually at the outflow, so it actually collects all of the water that flows out of that subarea. It is not on one branch or another; it is at the outlet. It is four kilometres downstream of what was the Sears Road bridge at which we have had temporary gauging stations, but through the site investigations that our hydrographers undertake to determine the best place in the catchment to collect the hydrographic information that they do, the Manjimup Brook outflow gauging station is a much superior site to the Sears Road that we have tried to operate. The Sears Road is quite wide, so for a very small change in water height, you get quite a large volume recorded and that creates errors for us. The water enters that area at an angle, which is difficult to measure. The site also has pylons in the middle of

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<sup>540</sup> Tyne Logan, 'Farmers in a town with annual rainfall of 981mm face a shortage of water for irrigation', *ABC News*, 18 September 2018.

<sup>541</sup> Mal Gill, 'Irrigation plan divides Manjimup community', *Farm Weekly*, 24 June 2019.

<sup>542</sup> Hon Terry Redman MLA, letter to Standing Committee on Environment and Public Affairs, 22 August 2020, p 1.

<sup>543</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 9 and Ralph Addis, Director General, Department of Primary Industries and Regional Development, letter, 10 June 2020, attachment 1, p 2.

<sup>544</sup> *ibid.*

<sup>545</sup> Tabled Paper 2831, Legislative Council, 27 June 2019, p 1.

<sup>546</sup> Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 10.

the bridge that change the characteristics of that. When we compare that to the Manjimup Brook outflow, it is a much narrower site; the water pretty much hits it straight on. It is a much better site for us to do our measurements on.<sup>547</sup>

6.123 In relation to the water seen rushing through the watercourses in the Manjimup Brook/Yanmah-Dixvale subarea, DWER told the Committee that this is due to under use of allocated or licenced water.<sup>548</sup> If the licence holders are not using water in their dams, there is less need to draw water to top up the dams and large volumes of water can be seen flowing through the watercourses, giving the perception that there is more water that could be allocated.<sup>549</sup>

Figure 7. Gauging station at Manjimup Brook



[Source: Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 August 2020, attachment 1.]

### Spring rights controversy

6.124 There are no local by-laws prescribing springs in the Warren-Donnelly catchment to be subject to the RIWI Act Part 3 licencing provisions.<sup>550</sup> Under the RIWI Act, DWER has no authority to regulate exempt water.

<sup>547</sup> Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2019, p 10.

<sup>548</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 9.

<sup>549</sup> Ben Drew, Manager, Water Allocation Planning, Department of Water and Environmental Regulation, transcript of evidence, Standing Committee on Environment and Public Affairs, 23 October 2019, p 13.

<sup>550</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, 12 June 2020, email, p 12.

6.125 There is no legislative head of power or statutory process for DWER to determine whether a spring exemption applies. Historically, spring rights under section 5 have been self-assessed by landowners. DWER has told the Committee that in some instances, these self-assessments have been incorrect (see subsection on licencing exemptions, paragraphs 6.29 - 6.53).

6.126 The Coalition told the Committee about a number of cases in the Warren-Donnelly catchment area where landowners believed they had 'spring rights' (a section 5 exemption), and were later advised by DWER that they did not. The Coalition feel that landowners in the area have received incorrect and inconsistent advice from DWER:<sup>551</sup>

In March 2019 DWER notified landowners in the Warren-Donnelly district in the Shire of Manjimup that the DWER has incorrectly issued letters confirming Spring Rights in the past and are being reviewed as they are identified. There is no certainty that the landowner is eligible for a new licence and the DWER has imposed limits to access water.<sup>552</sup>

6.127 The Coalition told the Committee about a landowner who was recently told his spring exemption did not exist. According to the Coalition, that landowner has challenged DWERs decision and his original licence quantity has been restored.<sup>553</sup>

6.128 Understandably, this has led to a level of anxiety amongst landowners reliant on spring rights for their water, who are worried that the same could happen to them at any time:

I currently live on a 128-acre property, which is totally spring rights. We are at a huge risk if spring rights are revoked and our property value would probably halve.<sup>554</sup>

Back then, they gave him spring rights on his property. He had licensing. He had 360 000 kilolitres I think he said. They give him spring rights. In December last year, they saw him and told him he has not got spring rights. He challenged it. They visited. They managed to say, "You haven't got spring rights but we'll give you a licence for 280"—I think that is what he was offered. He said, "No, I don't want that."

They have taken his spring rights and offered him a licence or far less—no, a decrease of about 25 per cent on what he had.<sup>555</sup>

6.129 DWERs actions have caused landowners, particularly those in fully allocated subareas in the Warren-Donnelly catchment, dependent on their spring rights for supply of water, significant anxiety and frustration. Section 5 of the RIWI Act provides a clear exemption from licencing where spring rights exist. David Wren, Secretary of the Coalition, explained from his perspective:

In this case, my understanding, and what the Legislative Council has said in legislation, is that you do not need a licence for springs. That is what it said—and you do not need a licence for run-off, but yet DWER is saying you need a licence.

Why do you need a licence? It says that you do not; it is on your property or it arrives at your property, use a spring—it is the first call of water. You get a flow of

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<sup>551</sup> The March 2019 notification is a reference to the Warren-Donnelly Water Update March 2019 newsletter.

<sup>552</sup> Submission 33 from Western Australian Water Users Coalition, 30 July 2019, p 4.

<sup>553</sup> Alan Blakers, Committee Member, Western Australian Water Users Coalition, transcript of evidence, 30 October 2019, p 4.

<sup>554</sup> Rosslyn Knowling, Chairperson, Western Australia Water Users Coalition, transcript of evidence, 30 October 2019, p 1.

<sup>555</sup> Alan Blakers, Committee Member, Western Australian Water Users Coalition, transcript of evidence, 30 October 2019, p 4.

water, you capture the run-off and you use it—that is what it says. But they are coming in saying that you need one.<sup>556</sup>

*Incorrect or inconsistent advice*

6.130 In addition to the issue of incorrect self-assessments by landowners, the Committee has heard evidence that in some instances the advice DWER has provided on the application of section 5 exemptions has been inconsistent or incorrect, advising that a section 5 exemption applies when it did not.<sup>557</sup> This was confirmed by Mr Moynihan at a hearing on 17 February 2020:

In the past there has been some inconsistent advice provided by the department to farmers around whether a spring right or an exemption from regulation for springs has applied.<sup>558</sup>

6.131 Mr Moynihan further advised:

Where the farmers or the dams are found to have received or have thought that they have an exemption for spring rights previously, there may be a correction made... There is an alternative approach put in place whereby a licensed water allocation will be issued to them for the equivalent of what the spring right, or what they saw as a spring right, was previously.<sup>559</sup>

6.132 The Warren-Donnelly Water Update newsletter issued by DWER, dated March 2019, states:

It is acknowledged that DWER has incorrectly issued letters confirming Spring Rights in the past and [these] are being reviewed as they are identified.<sup>560</sup>

*A licencing process for determining spring exemptions*

6.133 Section 5 of the RIWI Act provides that a spring exemption applies if certain criteria is established and provided local by-laws have not been implemented prescribing the spring as being a spring to which Part 3, meaning the licencing provisions of Part 3, apply.

6.134 The RIWI Act is silent as to who must determine whether a section 5 exemption applies. There is no legislative requirement for DWER to make a determination that a spring right exemption applies, although it is acknowledged that DWER has a role in enforcing the RIWI Act and there are penalties for taking water without a licence and where no exemption applies.<sup>561</sup>

6.135 DWER told the Committee that most dams in the Warren-Donnelly catchment do not have eligibility for a section 5 exemption.<sup>562</sup>

6.136 Mr Moynihan, at a hearing on 17 February 2020, told the Committee that DWER are currently going through a correction process with respect to section 5 exemption, or what the land owner thinks is a section 5 exemption spring dam:

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<sup>556</sup> David Wren, Secretary, Western Australian Water Users Coalition, transcript of evidence, 30 October 2020, p 7.

<sup>557</sup> Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2019, p 7.

<sup>558</sup> Jason Moynihan, Acting Executive Director, Regional Delivery, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 7.

<sup>559</sup> *ibid.*

<sup>560</sup> Department of Water and Environmental Regulation, Answer to question on notice 2 asked at hearing held 19 August 2020, dated 1 September 2020, attachment 3, p 3.

<sup>561</sup> *Rights in Water and Irrigation Act 1914 s 5C.*

<sup>562</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 June 2020, p 10.



With the increasing competition for water and, possibly, over-allocation in a number of areas, the department has been taking steps to confirm which dams do have access to that eligibility for spring rights and those that do not. Where the farmers or the dams are found to have received or have thought that they have an exemption for spring rights previously, there may be a correction made. There will be some communication to the farmer.<sup>563</sup>

6.137 Mr Moynihan explained that under the correction process:

No-one has a water allocation taken away from them.<sup>564</sup>

6.138 Mr Moynihan further explained:

There is an alternative approach put in place whereby a licensed water allocation will be issued to them for the equivalent of what the spring right, or what they saw as a spring right, was previously. The department is working through those on a case-by case basis, but it is fair to say that there are a number of farmers that believed that they did have spring rights that may not exist.<sup>565</sup>

6.139 The Committee sought to understand how DWER officers came to provide inconsistent and/or incorrect advice to landowners in the Warren-Donnelly catchment on whether a section 5 exemption applies:

The inconsistencies identified related to the application and interpretation of the Section 5 exemption as it relates to Section 2 and Section 3. Changes to the RiWI Act in 2000 included those to the definition of a 'spring' under Section 2, Section 3 in relation to 'Meaning of a "watercourse"' and amendments to Division 1 including Section 5. The Department has invested considerable resources since early 2018 to the existing interpretation and application of the Section 5 exemption to provide greater certainty to landholders. The Department has predominantly undertaken site visits to inspect, and confirm spring exemptions since this time; and has provided broader updates to growers and stakeholders through a number of mechanisms including public workshops (October 2018) and the Warren-Donnelly 'Water Update' newsletter.<sup>566</sup>

6.140 Noting that the RiWI Act amendments were enacted in 2000, and the action of enforcing an 'updated understanding' of the legislation by DWER commenced, on initial advice from DWER, in 2018, the Committee sought clarification as to whether the RiWI Act specifically stated that a spring must be at the head of a watercourse for a section 5 exemption to apply. Mr Moynihan explained:

The legislation covers off on it and there are some local water planning provisions and policies that underlie that.<sup>567</sup>

6.141 Subsequently at a hearing on 19 August 2020, in answer to a question from the Committee seeking clarification on the local provisions and policies, Mr Maskew said:

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<sup>563</sup> Jason Moynihan, Acting Executive Director, Regional Delivery, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 7.

<sup>564</sup> *ibid.*

<sup>565</sup> *ibid.*

<sup>566</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 June 2020, p 10.

<sup>567</sup> Jason Moynihan, Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 9.

In terms of any other information that we take into account in terms of spring exemptions, there are no underlying policies or local area management plans.<sup>568</sup>

- 6.142 DWER explained the reason for its enforcement that a spring must be at the head or start of the watercourse to qualify for a section 5 exemption:

it is a way to manage the water resource effectively so that the exemptions apply to those points at the start of the watercourse and do not capture others that may be difficult to manage. It is a water management approach...<sup>569</sup>

- 6.143 The Committee notes that the amendments to the RIWI Act were enacted in 2000, however, the actions by DWER to check or correct past incorrect self-assessments and incorrect or inconsistent advice by DWER to landowners began in 2018, some 18 years after the legislative amendments. The trigger being increased competition for water and subareas becoming fully-allocated. It appears that before this, DWER had not been actively enforcing the RIWI Act, or this particular 'updated understanding' or interpretation of the Act (see paragraph 6.49 for the Committee's view on legislative clarity).

- 6.144 DWER told the Committee that together with this 'correction process', in early 2018 it had instigated an 'administrative process' which enabled DWER to formally determine whether a section 5 exemption applies:

There is no legislative process for landowners to check eligibility for the spring exemption. The Department now uses the licence application process to determine whether a spring exemption applies.

...

The Department now recommends landowners submit an application to take water to support a formal determination of whether a Section 5 exemption applies, thereby limiting the risk of incorrect self-assessment and potentially contravening the legislation. If the section 5 exemption applies to that spring the applicant will be informed that a licence is not required to take water from that spring.<sup>570</sup>

- 6.145 The Committee notes DWER's advice to the Committee being that landowners claiming or seeking to claim a section 5 exemption were now required to make an application for a licence to take water.

- 6.146 If DWER determine that a section 5 exemption does not apply, the new administrative process requiring the landowner to make an application for a licence to take water, would enable DWER to issue a licenced water allocation for the equivalent of what the landowner thought was a spring right.<sup>571</sup> At the hearing, DWER did not inform the Committee that this was restricted to historic dams only. Subsequently, in written answers to questions on notice DWER qualified the application of this approach, saying it would be applied to historic dams only:

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<sup>568</sup> Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 2.

<sup>569</sup> Jason Moynihan, Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 9.

<sup>570</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 June 2020, p 10.

<sup>571</sup> Jason Moynihan, Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 7.

If a historic dam exists that has been incorrectly presumed as being exempt under Section 5, the Department will acknowledge that dam and its historic take of water through the issue of a licence equivalent to the dam's capacity.<sup>572</sup>

- 6.147 A historic dam is one constructed before March 2010. This is the date from which current use had been considered as part of developing the Plan.<sup>573</sup> DWER also informed the Committee that this approach would be applied even if the subarea was fully allocated.<sup>574</sup>
- 6.148 The Committee notes this marks a significant departure from DWERs initial advice. At the hearing on 17 February 2020, DWER said that if it was determined that a section 5 exemption did not apply, DWER would issue a licence to take water equivalent to what the landowner thought was a spring exemption.<sup>575</sup> The Committee was not told it applied only to historic dams. In an answer provided on 12 June 2020, DWER qualified this so as to restrict it to historic dams (pre-March 2010 construction) only.<sup>576</sup> The effect of this restriction being that despite DWERs earlier assurance that no one would have a water allocation taken away from them, if DWER determines a section 5 exemption does not apply and a landowners dam is not a historic dam, the landowners right, or what they thought was a right, to use the spring water is taken away and no licence to take water for the equivalent amount will be issued by DWER.
- 6.149 The Committee makes the observation that it appears this 'management approach' or 'administrative process' by DWER seeks to regulate unlicensed water use to the level of DWERs estimated unlicensed water use at the time of developing the Plan. If this is the case, this is concerning and disadvantages landowners with a spring on their land who had not sought a spring exemption or constructed a spring dam before the implementation of this new management approach/administrative process.
- 6.150 Since January 2018, DWER has undertaken 50 farm visits of 43 landholdings (some required multiple visits) and assessed 68 dams. Of the 68 dams, DWER determined that:
- 41 were spring dams under the section 5 exemption
  - 5 dams that were licensed, were correctly licensed as the section 5 exemption did not apply
  - 22 dams believed to be spring dams, either by incorrect self-assessment or incorrect earlier advice from DWER, were not eligible for a section 5 exemption. Of these:
    - 20 were determined to be historic dams and granted a license for the same amount as the capacity of the dam (DWER did not advise whether the landowners were required to lodge an application for a licence to take water)
    - 2 dams are still under consideration by DWER.<sup>577</sup>

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<sup>572</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 June 2020, pp 10-1.

<sup>573</sup> Rachel Osborne, Acting Ministerial Coordinator, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 1 September 2020, attachment 1, p 6.

<sup>574</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 June 2020, pp 10-1.

<sup>575</sup> Jason Moynihan, Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 7.

<sup>576</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 June 2020, pp 10-1.

<sup>577</sup> Rachel Osborne, Acting Ministerial Coordinator, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 1 September 2020, attachment 1, pp 4-5.

6.151 The following is a breakdown of the individual landholders/properties visited by subarea, as provided by DWER.

Table 5. *Individual properties visited by subarea*

Subarea	Number
Middle Donnelly	8
Manjimup Brook – Yanmah-Dixvale	8
Smith Brook	6
Upper Lefroy	7
Lefroy Brook	6
Treen Brook	3
East Brook	1
Upper Warren	1
Wilgarrup	3

[Source: Rachel Osborne, Acting Ministerial Coordinator, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 1 September 2020, attachment 1, p 5.]

6.152 While acknowledging DWERs intention in establishing this new administrative process may have been to provide greater certainty or surety in relation to section 5 exemptions, the Committee is not persuaded that the process achieves this and considers it problematic. Encouraging or requiring landowners to go through the licencing process in order to formalise a spring exemption seems to the Committee like an attempt to regulate, and with no legislative head of power permitting DWER to do so, may be beyond DWERs legislative authority.

6.153 The Committee sought clarification from DWER on the legislative head of power permitting DWER to require landowners to go through the licencing process in order to formalise whether a spring rights exemption applies:

**Mr ROWE:** I think the answer to that would be that we are really try to make sure that for the avoidance of any doubt and to ensure that people are acting in accordance with the law, they use the licensing process to apply under the relevant section of the Rights in Water and Irrigation Act. If we find through that process that they do not actually require a licence because they are exempt, then we would confirm with them at the time that that is the case.

**The CHAIR:** But is that not contrary to the act, because the act specifically provides that a spring rights is exempt from the requirement of going through a licence process?

**Mr ROWE:** That is right. I understand where you are coming from, but I guess we are trying to be thorough and make sure that people are doing the right thing for their own sake and for everybody else's.<sup>578</sup>

6.154 According to Adam Maskew, South West Regional Manager, DWER, the head of power in the RIWI for DWERs involvement in this process is the 'fact that unless there is an exemption, a licence is required':

<sup>578</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 3.

By making application, they provide that surety for themselves that they will either get a water licence, or through that we will identify that an exemption applies and we will then cease the licensing process.<sup>579</sup>

- 6.155 The Committee does not consider this to be an express legislative power. Furthermore, it is unclear how landowners are meant to know about this expectation:

**The CHAIR:** How does the landowner reading the act know that they need to use the licence application process to determine that a section 5 exemption applies when the act clearly states that this is exempt from licensing?

**Mr MASKEW:** The act is silent in that state.

**The CHAIR:** I think it is a bit more than silent. I think that it expressly states that a licence is not required.

**Mr MASKEW:** It does.<sup>580</sup>

### **FINDING 27**

The *Rights in Water and Irrigation Act 1914* does not provide a legislative process for determining whether a section 5 exemption applies, and does not provide that this determination must be made by the Department of Water and Environmental Regulation.

### **FINDING 28**

There are no local by-laws in relation to springs in the Warren-Donnelly catchment.

- 6.156 On the issue of surety, the Committee sought clarification from DWER as to how this new administrative process provides landowners with greater certainty. Mr Maskew explained:

By making application, they provide that surety for themselves that they will either get a water licence, or through that we will identify that an exemption applies and we will then cease the licensing process.<sup>581</sup>

- 6.157 The Committee is concerned that this new administrative process provides landowners with little surety or comfort. The RIWI Act does not provide for DWER to make a determination on whether a section 5 exemption applies. The RIWI Act provides that spring rights are exempt from regulation. Further, some landowners have, in the past, sought DWERs advice and received written confirmation that a section 5 exemption applies, only now to be told that the earlier advice was incorrect,<sup>582</sup> so it is reasonable that landowners would have little confidence in any determination made by DWER under the new administrative process being correct or that it could be relied on into the future. The new process does not guarantee this. Furthermore, DWERs constant changes to the process do not instill confidence in the process.
- 6.158 In addition, there is no requirement under this new administrative process for DWER to provide reasons for its decision that a section 5 exemption does not apply. There is no right of review or appeal against a determination by DWER that a section 5 exemption does not

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<sup>579</sup> Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 3.

<sup>580</sup> *ibid.*, p 4.

<sup>581</sup> *ibid.*, p 3.

<sup>582</sup> *ibid.*, p 7.

apply.<sup>583</sup> In light of DWERs admission that DWER has provided inconsistent and incorrect advice on section 5 exemptions in the past,<sup>584</sup> understandably landowners have little to no confidence in DWERs decision making going forward. A right of review or appeal by an independent body is needed in order to provide landowners with some confidence going forward.

- 6.159 In response to the Committee’s question on whether this new administrative process applied across the whole of WA:

**Mr MASKEW:** It is certainly our preference for people to do that right across the state if they believe that an exemption exists for their property.

**The CHAIR:** Has this been communicated to landowners right across the state?

**Mr MASKEW:** We have done it on an as-needed basis in the more fully allocated areas and we progressively roll out that communication with people.

**Mr ROWE:** I think it is also probably safe to say that this situation arises predominantly in the areas that we are talking about today. It is not widespread right across the rest of the state where it becomes an issue.<sup>585</sup>

- 6.160 The apparent lack of consistency in DWER’s handling of spring rights has caused landowners in the Warren-Donnelly catchment to call for more transparency from DWER in relation to its decisions:

At the moment they are operating like a secret society...<sup>586</sup>

*A permit process for determining spring exemptions—DWERs new administrative process, mark 2*

- 6.161 In response to further questions from the Committee on this new administrative process to initiate an assessment by DWER for a spring exemption, DWER replied:

By way of providing greater clarity, the Department uses an application for a Permit to Interfere with the Bed and Banks of a Watercourse under Sections 11, 17 and 21A rather than an application for a licence to take water under Section 5C to trigger an assessment regarding exemptions from regulations related to springs.<sup>587</sup>

- 6.162 The most recent answer does not provide greater clarity, as suggested by DWER. To the contrary, it is at odds with its evidence to the Committee at hearings under oath (or affirmation) on 17 February 2020, 19 August 2020, and in answers to additional questions provided by email dated 12 June 2020.<sup>588</sup> A bed and banks permit is very different to a licence to take water.

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<sup>583</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 11 September 2020, attachment 1, p 3.

<sup>584</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 7.

<sup>585</sup> Adam Maskew, South West Regional Manager, and Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 4.

<sup>586</sup> Alan Blakers, Committee Member, Western Australian Water Users Coalition, transcript of evidence, 30 October 2019, p 9.

<sup>587</sup> Anthea Wu, Section Manager, Department of Water and Environmental Regulation, email, 8 September 2020, attachment 1, p 1.

<sup>588</sup> Jason Moynihan, Acting Executive Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 7. Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 7. Anthea Wu, Section Manager, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, page 10.

- 6.163 For a process DWER maintain they have been applying consistently since late 2016,<sup>589</sup> it is disturbing that DWER senior officers are not across the detail of the process and have initially provided incorrect evidence to the Committee only to subsequently, 16 days before the Committee was due to report, correct their evidence. This does little for DWERs credibility.
- 6.164 This most recent advice that the process uses a bed and banks permit to trigger an assessment regarding exemptions from regulations related to springs is also at odds with earlier advice provided by DWER:
- For a spring exemption, there is no bed and bank permit required when it is coming up on your property, so no set permit or application is required for that one.<sup>590</sup>
- 6.165 The Committee notes with concern DWERs change in its evidence to the Committee that if a section 5 exemption does not apply, a correction would be made issuing a licence to take water for the equivalent amount as the spring dam.<sup>591</sup> The answer provided by DWER on 11 September 2020 states that where a section 5 exemption does not apply, a licence to take water will be considered only if it is a historic dam and there is water available in the subarea or water resource.<sup>592</sup> This is a significant departure from its earlier evidence to the Committee and has significant implications for landowners.
- 6.166 DWER told the Committee that at the end of this new administrative process requiring landowners to make an application for a bed and banks permit, the landowner will receive a formal letter which acknowledges the application and notification that DWER considers, based on the application and a site assessment, the exemption from regulation applies in relation to the presence of a spring. Where regulated and unregulated storages (existing dams) on watercourses are present, these will be clarified for the landowner as part of the correspondence.<sup>593</sup> DWER did not say whether a formal letter would be provided if it determined that a section 5 exemption did not apply. Further, DWERs authority to review all existing dams on the watercourses on the property as part of an assessment for a bed and banks permit is doubtful.
- 6.167 The Committee reiterates its previously stated concern that a person reading the RIWI Act would not understand that this is required and DWERs imposition of this process may be beyond DWERs statutory authority. Also, if the spring dam is constructed, it is unclear whether the RIWI Act permits DWER to issue a bed and banks permit retrospectively.
- 6.168 DWER's answer to questions on 8 and 11 September 2020 identified another change in DWER's evidence to the Committee restricting the circumstances when DWER, on determining a section 5 exemption does not apply, would issue a licence to take water. DWER's evidence, on 12 June 2020, was if a section 5 exemption does not apply and it is an historic dam, DWER would make a correction by issuing a licence to take water to the capacity of the dam regardless of whether the water resource is fully or over allocated.<sup>594</sup> In its answers to questions provided on 8 and 11 September, DWER changed its evidence

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<sup>589</sup> Anthea Wu, Section Manager, Department of Water and Environmental Regulation, email, 8 September 2020, attachment 1, p 1.

<sup>590</sup> Jason Moynihan, Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 2 May 2020, p 10.

<sup>591</sup> Jason Moynihan, Acting Executive Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 17 February 2020, p 7.

<sup>592</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 11 September 2020, attachment 1, p 3.

<sup>593</sup> *ibid.*, p 2.

<sup>594</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 June 2020, pp 10-1.

saying that a licence to take water would only be issued if the water resource is not fully or over allocated.<sup>595</sup> Further, that where water is available in the water resource, DWER would consider issuing a licence, suggesting DWER may not necessarily issue a licence to take water.<sup>596</sup> This is a significant departure from its earlier evidence to the Committee that no one would have a water allocation taken away. This has significant implications for landowners.

## IMPORTANT NOTE

### **The Department of Water and Environmental Regulations' inconsistent evidence to the Committee**

On 8 and 11 September 2020, DWER changed its evidence to the Committee in relation to the new administrative process to trigger a determination regarding exemptions from regulations related to springs, in three material respects:

- The start date for the new administrative process was changed from early 2018 to late 2016. DWER now maintain the process has been applied consistently in the Warren-Donnelly since late 2016.
- The new administrative process requires a landowner to make an application for a permit to interfere with the bed and banks of a watercourse under sections 11, 17 and 21A of the RIWI Act, rather than an application for a licence to take water under section 5C.
- If a section 5 exemption does not apply, licencing for historic dams will be considered only if there is water available in the subarea or water resource, contrary to DWERs earlier evidence that licences to take water would be issued for the equivalent amount, being the capacity of the dam, regardless whether the subarea or water resource is fully allocated or over allocated.

This is in addition to DWERs evidence detailed earlier in this Chapter, being:

- If a section 5 exemption does not apply, only historic dams will be considered for licencing. Initially, DWERs evidence to the Committee did not alert the Committee that licencing would apply to historic dams only, however, its evidence that no one would have a water allocation taken away did not indicate any restriction of this licencing approach to historic dams only.

[Source: Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 8 September 2020, attachment 1 and email, 11 September, attachment 1.]

6.169 DWERs evidence to the Committee about the new administrative process requiring landowners to make an application for a bed and banks permit is that:

By making application, the applicant provides surety for themselves and the regulator that they will either be assessed for a licence to take water where an exemption does not apply or notified formally that the exemption applies. In doing so, the process:

- formalises a consistent process the Department undertakes to make an informed decision on the application;

<sup>595</sup> Anthea Wu, Section Manager, Department of Water and Environmental Regulation, email, 8 September 2020, attachment 1, p 1 and email, 11 September, attachment 1, p 3.

<sup>596</sup> *ibid.*



- reduces the risk of landholders interfering with the beds and banks of a watercourse by building storages that may potentially be in breach of the *Rights in Water and Irrigation Act 1914*. This in turn reduces the potential requirement for the landowner to seek trade or agreement for the storage, or potentially to remove the storage where an entitlement cannot be secured. Both of these requirements may represent costs to the landowner.
- allows consideration under the 'first-in first-served' methodology (where water is available in the resource, and where an exemption is not applied).<sup>597</sup>

6.170 The Committee notes that DWER's evidence to the Committee is that, in 2018-19 one agreement was entered into and in 2019-20 two agreements were entered into and the application forms indicate that the price paid was \$0.<sup>598</sup> Further, that if the dam exists, and DWER determine that a section 5 exemption does not apply, it is not a historic dam and the water resource is fully allocated, the landowner is likely to incur costs to remove the storage/dam. This was not noted by DWER in its evidence as detailed in paragraph 6.169.

6.171 The Committee sought clarification from DWER on whether it would guarantee to stand by its determination under the process, on whether a section 5 exemption applies, in the future. DWER replied:

The final letter reflects a decision related to information available at the time including legislation at the time. It also notes that the decision is subject to future changes in legislation, as mentioned by Mr Mike Rowe in his evidence to the committee.<sup>599</sup>

6.172 The Committee refutes DWER's statement that this was mentioned by Mr Rowe in his evidence to the Committee. Future changes to legislation should not impact an earlier decision made by DWER unless the relevant statutory provision provides, by express terms, that it is to apply retrospectively.

6.173 The Committee raised concerns about the new administrative process in relation to procedural fairness, there being no requirement for DWER to provide the landowner with reasons for its decision and there being no right to appeal the decision. DWER told the Committee that:

There is no formal appeals process for a decision on an application for a bed and banks permit under *the Rights in Water and Irrigation Act 1914*.

There are provisions within the RiWI Act for landowners to appeal to the State Administrative Tribunal when they move into their application for the 5C take licence if they need to go down this pathway. But initially a landholder may also lodge a complaint with the [Ombudsman] Western Australia.<sup>600</sup>

6.174 The Committee questioned how an application for a permit to interfere with the bed and banks of a watercourse would enable DWER to consider issuing a water allocation licence under the 'first in-first served' methodology (as DWER explained would be the case when it had previously informed the Committee that the landowner would make an application for a licence to take water). DWER answered as follows:

<sup>597</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 8 September 2020, attachment 1, p 1.

<sup>598</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 12 June 2020, attachment 1, p 13.

<sup>599</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 11 September 2020, attachment 1, p 2.

<sup>600</sup> *ibid.*, p 3.

Applications may be lodged with the department at any time. The submission of an application related to a stream exemption provides a formal acknowledgement by the landholder to develop the take and use of the water resource, thereby placing them in line for consideration against the respective resource. Where the Department considers that an exemption does not apply, and where water is available in the resource, an application to take water will be requested to complement the permit application. Where the resource is fully allocated and there is no exemption, the permit will likely be refused. However, the Department may license a historical spring dam above the allocation limit.<sup>601</sup>

6.175 The Committee notes that the benefits of ‘first in-first served’ methodology may be lost under this ‘version’ of the new administrative process, as another party may lodge an application to take water while DWER are considering the landowner’s application for a bed and banks permit, and therefore be ‘first in’. Also, under this process a landowner would be required to make two applications, an application for a bed and banks permit and an application for a licence to take water. The Committee suggests for these reasons, a process requiring an application for a licence to take water, as opposed to an application for bed and banks permit, would be superior and preferable from the landowners’ viewpoint.

6.176 Noting DWERs most recent evidence that the new administrative process has been applied consistently since late 2016, the Committee enquired as to DWER’s communication on this matter with landowners before the Warren-Donnelly Water Update newsletter of March 2019. DWER replied as follows:

It was applied to those applications received by the Department in this period and promoted at a series of public meetings held in late 2018 and the Water Update newsletter of March 2019, in addition to one-on-one meetings with landholders and licensees.<sup>602</sup>

6.177 The Committee also notes DWER’s earlier evidence, provided in response to further questions from the committee on 8 September 2020, that:

There has been no broad public notice of the specific mechanism of using an application for a permit to interfere with the bed and banks of a watercourse under Sections 11, 17 and 21a of the RIWI act to initiate an assessment for an exemption related to springs.<sup>603</sup>

6.178 It is of concern to the Committee that although the new process was established in late 2016, based on DWER’s evidence, it did not inform landowners of the new process until it held public meetings or workshops in late 2018. In light of the RIWI Act express provision that there is no regulation of spring rights and DWER’s lack of communication on this new process, it is difficult to comprehend how a landowner would have known in late 2016, 2017 and early to mid-2018 to make an application under this new process.

6.179 The Committee sought to understand how many landowners seeking DWERs confirmation that a section 5 exemption applied, were aware of this new administrative process and made an application for a bed and banks permit for each year since 2016. DWER was less than forthcoming in its reply, saying that its records do not differentiate between a bed and banks permit for spring dam exemptions and for other reasons. The best DWER could say is that it had undertaken 43 site visits to make assessments of spring exemptions since January 2018

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<sup>601</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 11 September 2020, p 3.

<sup>602</sup> *ibid.*

<sup>603</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 8 September 2020, attachment 1, p 1.

and a further 3 were undertaken in the period July 2017 to December 2018.<sup>604</sup> The Committee notes the overlap of 12 months being January 2018 to December 2018. The reason for this overlap is not clear. DWER did not say whether a bed and banks permit application or a licence to take water application was made in relation to any of these visits.

#### **FINDING 29**

There is no legislative head of power for the new administrative process instigated by the Department of Water and Environmental Regulation enabling it to make a determination as to whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies.

#### **FINDING 30**

The *Rights in Water and Irrigation Act 1914* expressly provides that 'spring rights' are exempt from regulation unless a by-law is enacted bringing the spring within the Act's Part 3 licensing provisions.

#### **FINDING 31**

Almost four years after the Department of Water and Environmental Regulation instigated a new administrative process enabling it to make a determination on whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies, the Department is unable to provide clear and consistent details of the process even though the Department maintains that it has consistently applied the new process since late 2016.

#### **RECOMMENDATION 28**

The Minister for Water commission an independent inquiry into the Department of Water and Environmental Regulations new administrative process requiring landowners to make an application for a bed and banks permit so as to enable the Department to determine whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies. The matters to be examined by the inquiry to include:

- the Department's legislative authority for imposing the process
- compliance with the new process
- the effectiveness of the process in achieving the desired outcomes
- whether the process has been consistently applied by the Department
- landowners concerns with the process
- legislative changes needed to give statutory effect to the process
- changes needed to improve the process, having regard to procedural fairness and a right of review by an independent body.

#### **RECOMMENDATION 29**

If the Department of Water and Environmental Regulation is to persist with its new administrative process requiring landowners to make an application for a bed and banks permit so as to enable the Department to determine whether a section 5 exemption applies, the Minister for Water introduce in the Parliament of Western Australia a Bill to amend the *Rights in Water and Irrigation Act 1914*, to expressly provide for the process and for a right of review or appeal to an independent body. The Bill to also provide for the Department of Water and Environmental Regulation to establish and maintain a register of spring exemptions and spring dams.

<sup>604</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 11 September 2020, attachment 1, p 3.

*DWERs communication to landowners in the Warren-Donnelly about the new administrative process*

6.180 The new administrative process for DWER to determine whether a section 5 exemption applies has been communicated to landowners:

We have held a number of workshops, particularly in the Warren– Donnelly area, over the last three years or so where we have talked about the spring exemption and how that determination is made. We have sent out numerous newsletters to our licensees and those newsletters are also placed in the local shire, on our countertop and also at the local ag department as part of that information as well.<sup>605</sup>

6.181 In response to the Committee’s request for a copy of each of the ‘numerous newsletters’, DWER provided one newsletter only—the Warren-Donnelly Water Update dated March 2019.<sup>606</sup>

6.182 In addition to acknowledging that ‘DWER has incorrectly issued letters confirming Spring Rights in the past and [these] are being reviewed as they are identified’, the newsletter states:

You must have written confirmation from the department that you qualify for spring rights.<sup>607</sup>

And:

to reduce the risk of being in breach of the legislation and associated enforcement activity you need to ensure you get confirmation from DWER as to whether you have spring right before you undertake any works.<sup>608</sup>

6.183 The newsletter contains no information about the new administrative process requiring landowners to make an application for a bed and banks permit, so to enable DWER to determine whether a section 5 exemption applies. Nor the possible requirement for a licence to take water, should DWER determine that a licence is required. The March 2019 edition of the newsletter is the first edition of the newsletter and the process, based on DWERs evidence, has been consistently applied since late 2016.<sup>609</sup>

6.184 The Committee pressed DWER for a copy of each of the numerous newsletters informing landowners of the new administration process, only to be told that the Warren-Donnelly Water Update March 2019 edition is the only one in which the matter is raised.<sup>610</sup>

6.185 Further, the Committee understands that DWER emails the newsletter to licensees in the Warren-Donnelly catchment, however, not all landowners with self-assessed spring dams also hold a water allocation licence and therefore do not receive the newsletter as they are not licensees.<sup>611</sup>

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<sup>605</sup> Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 4.

<sup>606</sup> Department of Water and Environmental Regulation, Answer to question on notice 2 asked at hearing held 19 August 2020, dated 1 September 2020, p 2.

<sup>607</sup> *ibid.*, attachment 1, p 3.

<sup>608</sup> *ibid.*

<sup>609</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 8 September 2020, p 1.

<sup>610</sup> *ibid.*

<sup>611</sup> Adam Maskew, South West Regional Manager, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 4.

- 6.186 No letters have been sent to impacted landowners informing them of the new administrative process, and no broad public notice on the process has been issued.<sup>612</sup>
- 6.187 The Committee was not able to verify whether information on the new administrative process has been provided at workshops and at one-on-one meetings with landowners and licensees as stated by DWER.<sup>613</sup>
- 6.188 In response to a question, DWER told the Committee the newsletters are not available on the DWER website, however, DWER has commenced work on making them available on its website, which should be finalised in the coming weeks.<sup>614</sup>
- 6.189 It would appear DWERs communication with landowners in the Warren-Donnelly catchment falls well short of what the community would expect of a government department and as a result some Warren-Donnelly landowners would be unaware of DWERs new administrative process, which does not bode well for compliance and its success. The Committee is of the view that DWER needs to vastly improve its communication with landowners in the Warren-Donnelly area. When implementing a new administrative process, DWER should write directly to impacted landowners.

### **FINDING 32**

The Department of Water and Environmental Regulation's communication with landowners in the Warren-Donnelly catchment on the new administrative process for the Department to determine whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies was tardy, lacked detail as to the mechanisms of the process and did not reach all impacted or potentially impacted landowners. Nor did it include a public communication to all in the Warren-Donnelly catchment.

### **RECOMMENDATION 30**

If the Department of Water and Environmental Regulation persist with this administrative process to trigger a determination by the Department on whether a section 5 exemption under the *Rights in Water and Irrigation Act 1914* applies, the Department write to all owners of agricultural land in the Warren-Donnelly area to inform them of the process, including details of the mechanisms of the process. Further, the Department is to issue a public notice detailing the process and its mechanisms.

### **RECOMMENDATION 31**

The Department of Water and Environmental Regulation immediately make its newsletters available on its website.

### **RECOMMENDATION 32**

The Department of Water and Environmental Regulation develop, in consultation with agricultural landowners in the Warren-Donnelly catchment, a communication strategy that identifies those matters the Department must communicate to owners of agricultural land, commits to timely communication, and to communicate in writing directly with owners of agricultural land in the Warren-Donnelly catchment (not licensees only).

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<sup>612</sup> Anthea Wu, Section Manager, Ministerial Liaison Unit, Department of Water and Environmental Regulation, email, 8 September 2020, attachment 1, p 2.

<sup>613</sup> *ibid.*

<sup>614</sup> *ibid.*, p 2.

### *Register of spring dams*

6.190 Under Part 3, Division 3E of the RIWI Act, DWER is required to keep a register of the various instruments that are issued under that Act. Instruments for that purpose are defined as a licence under section 5C, an exemption under Section 26C and a direction under Sections 22, 26G or 26GC. The RIWI Act also specifically prescribes the information that is to be in the register in respect of each instrument.<sup>615</sup>

6.191 On the question of whether spring rights are included in the register, Mr Rowe said:

Because a spring right is not prescribed as part of the definition of an “instrument”, it is considered out of scope for inclusion in our register.<sup>616</sup>

Mr Moynihan added:

it is not captured in the definitions or provisions of the act, so it cannot be included in the register at this stage.<sup>617</sup>

6.192 The Committee asked whether registering spring rights had been considered by DWER:

**The CHAIR:** I appreciate that the registering of the spring rights is not required under the current legislative scheme. Has any consideration been given to amending the legislative scheme to require the registration of spring exemptions?

**Mr ROWE:** No, Ms Farina, there has not been.

**The CHAIR:** Do you think that would assist with some of the controversy that is occurring in the Warren–Donnelly area?

**Mr ROWE:** I do not have a strong view on that at the moment... I guess it is a policy choice for the government of the day as to whether or not they feel as though this needs to be given greater clarity through some other process in the legislation.<sup>618</sup>

6.193 The Committee sought clarification on whether, under the new administrative process, DWER had considered establishing a register of approved spring dams to provide landowners with surety and people purchasing property easily access that information prior to purchase.

Mr Rowe told the Committee:

I do not know that we have given that any consideration. Adam, do you have any insights into that in particular? No? I do not have an answer to that at this stage...<sup>619</sup>

6.194 The Committee is of the view that if DWER are to persist with their new administrative process requiring DWER to formally determine if a section 5 exemption applies, DWER should establish a register of spring rights and spring dams.

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<sup>615</sup> *Rights in Water and Irrigation Act 1914, s 26GZJ*

<sup>616</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 8.

<sup>617</sup> Jason Moynihan, Director, Regional Services, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 8.

<sup>618</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 20 May 2020, p 9.

<sup>619</sup> Michael Rowe, Director General, Department of Water and Environmental Regulation, transcript of evidence, 19 August 2020, p 6.