



Our Ref:
Your Ref:
Office: Perth
Date: 5 August 2021

To: Richard Newman
Native Vegetation Regulation
Department of Water and Environmental Regulation
8 Davidson Terrace
Joondalup Western Australia

By email: betterregulatorypractice@dwer.wa.gov.au

Dear Mr Newman,

RE: Draft Guideline: native vegetation referrals

Yamatji Marlpa Aboriginal Corporation (**YMAC**) is the Native Title Representative Body (**NTRB**) for the Pilbara, Murchison, Mid-West and Gascoyne regions of Western Australia. YMAC is a not-for profit organisation run by an Aboriginal Board of Directors and represents several native title claim groups and registered native title bodies corporate (**RNTBCs**). YMAC provides a range of services, including native title claim and future act representation, heritage services, community and economic development assistance, and natural resource management support.

The draft guideline in relation to native vegetation referrals (**Guideline**) has been developed to inform stakeholders about the new native vegetation clearing referral process that will be introduced when amendments to the *Environment Protection Act 1986 (EP Act)* take effect in the second half of 2021, and particularly the s.51DA permit referral process.

Native vegetation and its protection is important to the native title groups YMAC assists. It can be relevant to the protection of Aboriginal sites and objects, and maintaining flora and fauna may also have cultural significance to Traditional Owners.

YMAC has concerns in relation to the proposed Guideline and thanks the Department of Water and Environmental Regulation (**Department**) for the opportunity to provide comments in relation to it.

Issue 1: The Guideline doesn't address Aboriginal cultural heritage as an environmental value to be taken into account as a consideration in determining the need for a clearing permit.

The definition of 'environment' contained in s.3 of the EP Act includes the social surroundings of living things. Section 3(2) further defines 'social surroundings' to include 'aesthetic, cultural, economic and social surroundings.' We are concerned that the Guideline makes no specific mention of Aboriginal cultural heritage considerations and impacts. In our view, specific attention needs to be drawn to this issue.

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Consideration 2 of the Guideline relates to consideration of potential impacts on environmental values within the area including biological values, conservation values and land and water resource values. We consider that heritage values should be specifically mentioned in this section.

Further, Table 2 which lists more environmental values should refer to Aboriginal cultural heritage and the consideration in determining the need for a permit should refer to *whether the proposed clearing impacts Aboriginal cultural heritage*.

Recommendation 1: *Heritage values should be specifically addressed in the Guideline as required to be considered in determining whether a native vegetation clearing permit is necessary in accordance with the referral process.*

Issue 2: No consultation with Traditional Owners required before the proponent refers a low impact clearing referral and no notification to Traditional Owners of the proposal and opportunity to comment.

Section 223 of the Native Title Act defines native title rights and interests as:

the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

Native title acknowledges the connection Traditional Owners have with land and water and their substantive rights and interests in land and waters, upon a determination. Native title grants Aboriginal people the right to exercise those rights and interests on Country.

In YMAC's view it is paramount to the protection of Aboriginal sites or objects that vegetation clearing permits are granted with the knowledge and consent of the Traditional Owners. If there is no requirement to consult the Traditional Owners, there will potentially be an expectation by proponents that an exemption from obtaining a permit will exempt them from other approvals that may be required. The only way to effectively ensure that vegetation clearing does not impact Aboriginal cultural heritage is to ensure that engagement between proponents and Traditional Owners occurs.

To assist with protection of Aboriginal cultural heritage we suggest including a requirement in the Guideline that proponents obtain a statement from the Registered Native Title Body Corporate (RNTBC) or registered native title claimants (whichever is relevant depending on native title status) for the clearing area confirming they have been consulted and have approved the clearing of native vegetation in that area. Where such consent is not provided, a native vegetation clearing permit should be required.

We note that where a clearing permit is applied for, s.51E(4)(b) of the EP Act compels the CEO of the Department, to invite any public authority or person with a direct interest in the subject matter of the application to comment. While this does not equate to a requirement for native title holder consent to be provided, it at least provides the native title holders with an opportunity to inform the CEO of any Aboriginal sites or objects that may be of significance, including those which may not be listed on the Aboriginal Heritage Information System (AHIS).

As stated above, YMAC considers that consultation with and consent of native title holders is highly preferable, to ensure native vegetation clearing does not impact cultural heritage. However, at a minimum, native title holders should at least be notified of proposed native vegetation clearing on their Country and have opportunity to comment on any proposal. If a requirement as to native title holder confirmation of consent is not included, then the Guideline should at least provide for the CEO of the relevant department to notify native title holders of the proposal and consider any comments received before deciding no permit is required.

While the referral process described in the Guideline only applies to clearing with “very low environmental impacts,”¹ YMAC submits that the level of impact on biological and conservation values is unlikely to correlate with the likely degree of impact to Aboriginal cultural heritage. Therefore, without proper consultation with the native title holders, native title rights and interests are not adequately considered under the referral process, and adequate protection of Aboriginal cultural heritage is not achieved.

Recommendation 2: *Consultation must be conducted with all RNTBCs or registered native title claimants for the relevant area before a referral application can be made under the native vegetation clearing referral process. Alternatively, as a minimum, native title holders must be notified and provided with an opportunity to comment before a decision is made that a native vegetation clearing permit is not required.*

Issue 3: The draft Aboriginal Cultural Heritage Bill 2020 (ACH Bill) circulated in late 2020 provides that a clearing permit is an exempt activity. Even if this is amended it may still include referrals under s.51DA where a decision is made that a permit is not required.

YMAC has concerns about the relationship between the EP Act and the anticipated ACH Bill, which is expected to be brought before Parliament in 2021.

Under ss. 90 and 100 of the draft ACH Bill circulated in 2020, the clearing of native vegetation pursuant to a clearing permit granted under Part V of the EP Act is an exempt activity. This means that where a proponent obtains a clearing permit, the relevant clearing could be undertaken without having regard to any heritage protection requirements.

In a letter dated 24 June 2021 to YMAC, the Minister indicated that the ACH Bill will be amended to restrict the exempt activity to small scale clearing that is exempt under the EP Act. At the date of writing this submission we have not seen the updated drafting of this proposed change however YMAC has concerns that the exemption will still be applied to referrals under s.51DA, where a decision is made that a permit is not required under the EP Act. Clearly, that should not be the case.

The risk that a proponent clearing native vegetation might not be subject to any heritage protection regulation highlights the need for Aboriginal cultural heritage to be adequately considered in the context of the referral process, to ensure that Aboriginal cultural heritage is not inadvertently impacted.

Recommendation 3: *Aboriginal cultural heritage must be adequately considered in the context of the referral process to ensure it is not inadvertently impacted particularly having regard to the clearing of native vegetation exemption contained in the ACH Bill.*

¹ *Guideline: Native vegetation referral (DRAFT)*, section 3.3.

Conclusion

While the EP Act amendments work to reduce the administrative burden for the relevant departments and red tape for proponents around native vegetation clearing permits, they do not provide adequate protections for Aboriginal heritage as required by the EP Act.

We request you consider and take into account our recommendations and amend the draft Guideline accordingly to endeavour to ensure the interests and cultural heritage of native title holders are adequately protected when it comes to low impact native vegetation clearing.

Again, we thank you for the opportunity to make this submission.

Yours Sincerely,



Simon Hawkins

Chef Executive Officer