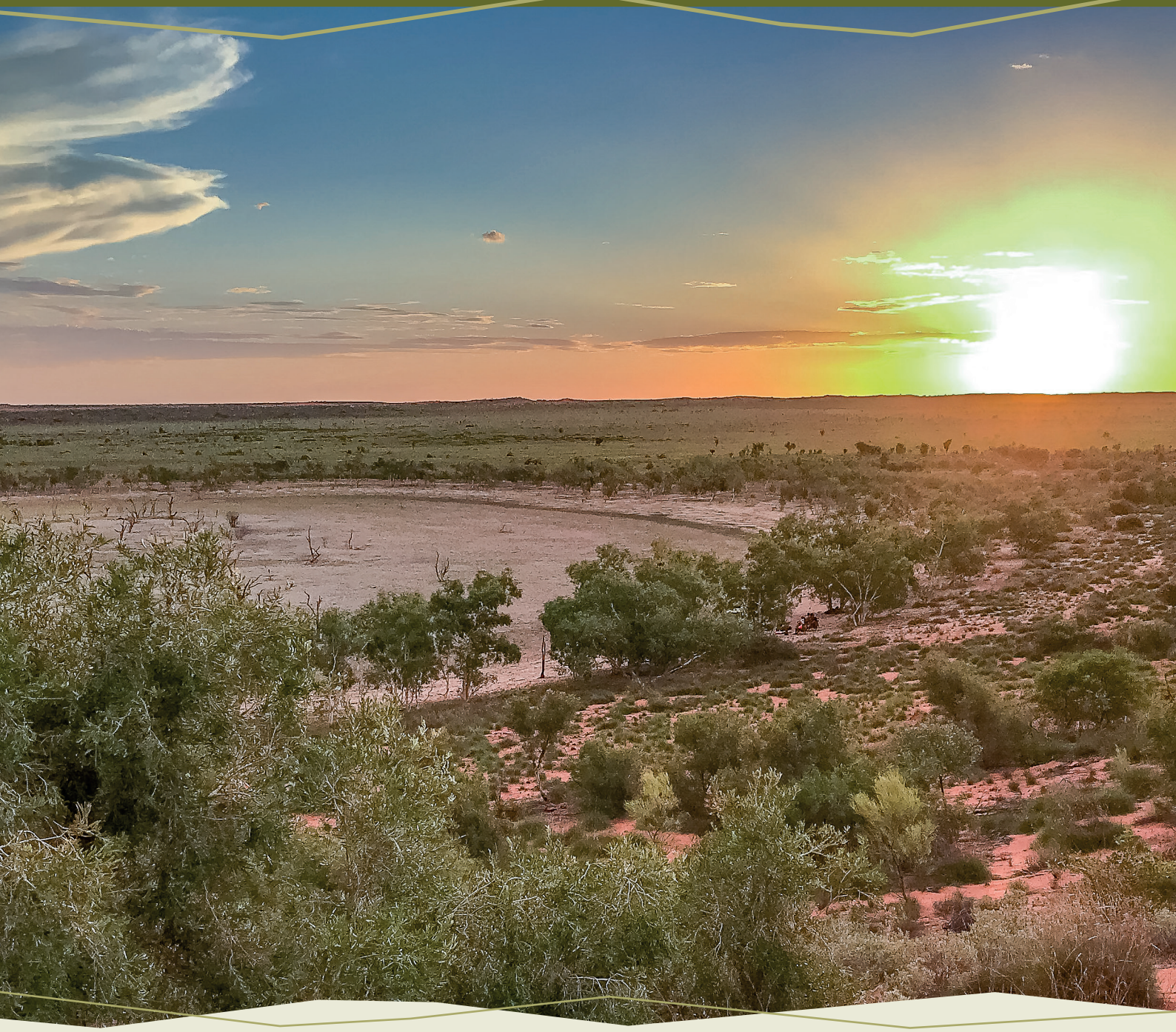
country
culture
people
future

Licences – *Land Administration Act 1997* (WA)



Nyangumarta Country
(Photo: Jacob Loughridge)

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What is a licence?

In a legal context, a licence is an official authorisation, given by a government or authorised body, permitting individuals or organisations to undertake specific activities. It essentially creates a contractual right between the parties.

To use Crown land for a particular purpose, organise an event, or carry out an activity on such land, individuals or organisations may need to acquire a licence under the *Land Administration Act 1997* (WA) (LAA). These licences are usually granted for a limited period, intended for low-impact activities, and typically do not grant exclusive rights or formal land tenure.

The Western Australian Minister for Lands, acting through the Department of Planning, Lands, and Heritage (DPLH), has the authority to grant these licences pursuant to sections 91 and 48 of the legislation, which covers licences over unallocated Crown land, pastoral leases, unmanaged and managed reserves.

Characteristics of a licence

Some examples of activities that may require a licence include access to land to undertake feasibility studies, short-term land management for community groups, timed events like rallies or marathons, ceremonial gatherings, filming, and more.

Licences:

- do not extinguish native title,
- coexist with mining or petroleum rights,
- are generally not transferrable,
- are generally non-exclusive,
- do not create an interest in land,
- cannot be registered under the *Transfer of Land Act*, and
- allow the underlying tenure to remain as Crown land.

Statutory requirements

Amongst the many other statutory approvals required, DPLH must consider the impact on native title rights and interests, and requires the applicant to consult with, and obtain consent from, any determined Native Title Holders before granting a licence.

Given the nature of LAA licences, DPLH seems to generally rely on s24LA of the *Native Title Act 1993* (Cth) (NTA) to grant licences within undetermined areas. In these cases, the licence may include a provision that it expires upon the positive determination of native title rights.

DPLH also requires applicants to obtain the consent of any other relevant authorities and to adequately plan, liaise, and coordinate the proposed use or event. This may involve developing emergency plans, risk management procedures, and establishing communication with relevant authorities and agencies, such as local governments and local emergency management committees.

When it comes to pastoral leases, requests for licences for non-pastoral purposes are referred to the Pastoral Lands Board before DPLH undertakes further due process to grant a licence. It's important to note that pastoral lessees do not possess the authority to permit or authorise non-pastoral activities on the land.

Forms of licences

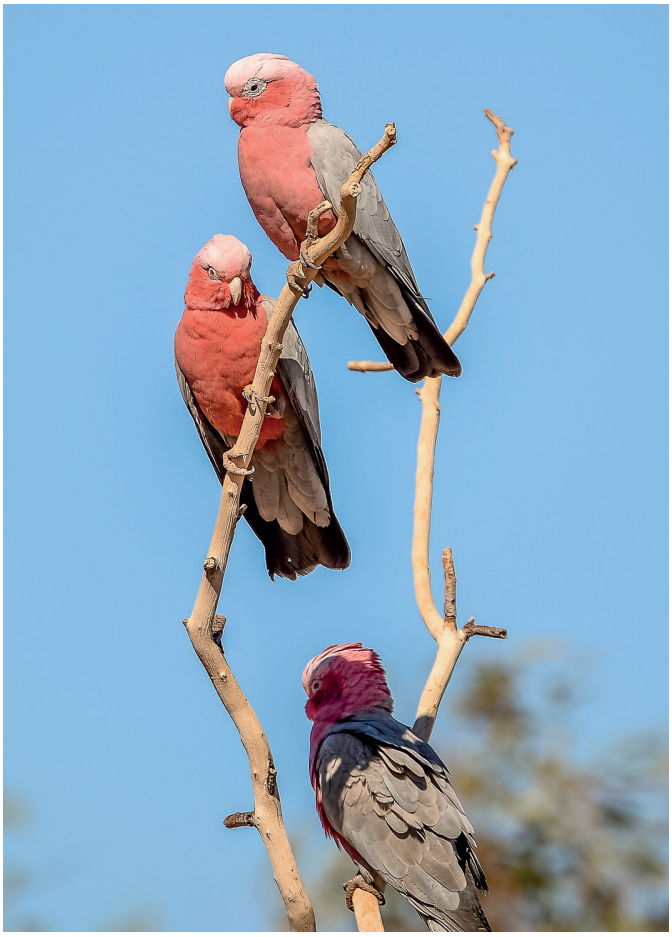
There are four basic precedent forms for licences granted under the LAA.

1 The common standard licence, which is suitable for low impact and low contamination risk situations.

2 The events licence for short term activities, such as car rallies and even marathons.

3 The low impact licence within a claim area, with the provision that the licence will come to an end once a determination of native title is made.

4 The native title determination licence, where the licence falls within a positive determined area, noting that the licence comes to an end in the event that native title consent is withdrawn.



Nyangumarta Country
(Photo: José Kalpers)

Renewable energy projects and section 91 licences

The first engagement native title groups may have with renewable energy proponents in Western Australia is in relation to the proposed grant of a section 91 licence.

Prior to planning a renewable energy project, proponents need to understand the renewable energy resources available, including solar irradiation and wind variability of the site. The appropriate mechanism to achieve this understanding is by undertaking investigative studies under a section 91 licence.

As mentioned earlier, section 91 licences do not create an estate or interest in land, nor do they confer a right of exclusive possession in the licence area. They are required in order for proponents to collect flora, fauna, soil, groundwater, topography, salinity and other environmental data for the purposes of assessing the feasibility of a renewable energy project.

Section 91 licences would be considered low-impact future acts under s24LA of the NTA if they were to be granted before an approved determination of native title.

For such acts to occur post-determination, an Indigenous Land Use Agreement (ILUA) is required for the act to validly affect native title.

Current State Government policy deals with this requirement by mandating that renewable energy proponents obtain the consent of the relevant Prescribed Body Corporate (PBC)[1] before section 91 licences are granted by DPLH.

That requirement is included as a term of the licence.

YMAC contends proponents must not only obtain a PBC's free, prior and informed consent to the initial grant of the section 91 licence, but must also provide evidence the consent is ongoing, such as through regular updates and engagement as the project feasibility studies progress during the term of the section 91 licence – typically five years.

YMAC has developed a template section 91 licence proponent agreement for its PBC clients for this purpose.

1 Note, for simplicity, YMAC uses the term "PBC" in most publications to refer to both Prescribed Bodies Corporate (PBCs) and Registered Native Title Bodies Corporate (RNTBCs). This is in line with terminology that is regularly used in the native title sector.

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Geraldton
144 Flores Road
Webberton WA 6530
PO Box 2119
Geraldton WA 6531
T: 08 9965 6222

Perth
Level 8,
12 The Esplanade
Perth WA 6000
PO Box 3072
249 Hay Street
East Perth WA
6892
T: 08 9268 7000

Hedland
8 Manganese Street
Wedgefield WA 6721
PO Box 2252 South
Hedland
WA 6722
T: 08 9160 3800

Broome
Shop 2/24
Clementson Street
Broome WA 6725
PO Box 2059
Broome WA 6725

Carnarvon
4 Francis Street
Carnarvon WA 6701
PO Box 1424
Carnarvon WA 6701
T: 08 9965 6222
(open Tues, Wed, Thurs)

ymac.org.au
Freecall: 1800 270 709
ICN 2001

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ABORIGINAL CORPORATION
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