

**REGULATION OF LAND CLEARING:
REFORMING THE LAW IN WESTERN AUSTRALIA**

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A. INTRODUCTION

- (1) Western Australia is one of the most biologically diverse places in the world. It is also one of the places in which biodiversity is most under threat. In particular, the South West of Western Australia has been identified as one of 25 global biodiversity “hotspots” due to the high number of endemic plant and animal species in the region, and the level of threat they face.

- (2) Land clearing has historically been the most significant cause of biodiversity loss in Western Australia, and remains a significant cause of such loss. Clearly, it must be effectively regulated if we are to protect Western Australia’s remaining biodiversity. This paper considers the effectiveness of our existing land clearing laws. It concludes that they are ineffective and in need of reform. It then puts forward a proposal for reform.

B. LAND CLEARING REGULATION: A PATCHWORK QUILT WITH HOLES

- (3) Currently in Western Australia we have a patchwork of different laws relating to land clearing. The rules for land clearing differ depending on factors such as where the clearing is to take place, the tenure of the land in question and the purpose of the clearing.

Agricultural clearing outside declared drinking water catchments

- (4) Clearing for agricultural purposes in the South West agricultural region of Western Australia is regulated by a mix of laws, coordinated by a non-binding Memorandum of Understanding (“MOU”). The process established by the MOU is described at Appendix A to this paper. In essence, the process involves:

- ∄ notification of proposed clearing in excess of one hectare;
 - ∄ possible issuing of a soil conservation notice by the Commissioner for Soil and Land Conservation (“Commissioner”) to object to proposed clearing ; and
 - ∄ possible assessment of the environmental impacts of the clearing proposal by the Environmental Protection Authority (“EPA”).
- (5) The involvement of the EPA is crucial to this somewhat cumbersome process. This is because the environmental impact assessment process can take into account the impacts of clearing on biological diversity, but the Commissioner cannot. The Commissioner is limited to consideration of “land degradation” issues, such as salinity, which may result from proposed clearing.¹
- (6) There has been a significant decline in the level of authorised agricultural clearing since controls were introduced in 1986, and in particular since the MOU came into effect. Authorised clearing for agriculture in the south west amounted to less than 1000 hectares in 2000 – 2001. This trend is due to an increasingly strict approach to land clearing by the Commissioner for Soil and Land Conservation and the EPA.
- (7) However, the encouraging statistics concerning authorised land clearing mask two real problems with the effectiveness of current laws.
- (8) First, there is evidence that the existing legislation relating to agricultural clearing, with its maximum penalty of \$2,000 for those failing to notify proposed clearing, is not effective in ensuring that proponents of clearing enter the regulatory process. This was graphically demonstrated by the clearing that took place in December 2001 on a rural-zoned property at The Lakes, some 50km north east of Perth. A Channel 9 camera crew filmed the clearing of this property, which had been commenced without the required notification and continued even after an officer from the Department of Agriculture requested that it stop. This is not an isolated case. There were 46 substantiated cases of non-urban illegal clearing between January 1998 and July 2001ⁱⁱ and satellite imagery shows significant unauthorised clearing in the agricultural region during the same period.ⁱⁱⁱ Some landholders have openly signalled their intention to defy the current laws.

- (9) A second problem is that a loophole in existing laws means that clearing may take place before the decision-making process is complete. If clearing is notified, the Commissioner does not impose a soil conservation notice and 90 days elapses from the date of notification, then no offence will have been committed if the landholder proceeds to clear, even if the EPA is in the process of assessing the land clearing proposal. This is exactly what happened in the case of one clearing proposal in 1999.^{iv}

Roadside vegetation in agricultural areas

- (10) The agricultural land clearing laws considered in paragraphs (4) to (9) above do not cover clearing of roadside vegetation. Roadsides are often the most significant areas of remnant vegetation in agricultural areas.^v However, there is no obligation on the Main Roads Department or local governments to notify their intention to clear roadside areas. This is because the Commissioner for Soil and Land Conservation takes the view that clearing for road construction does not amount to a “change in the use of the land” for the purposes of the *Soil and Land Conservation Regulations 1992*. This problem is further compounded by the fact that the Commissioner takes the view that a soil conservation notice cannot be imposed to prevent clearing because the clearing is carried out by a public authority.^{vi} Thus even if the proposed clearing does come to the notice of the Commissioner, he cannot compel the local government or Main Roads Department to refrain from further clearing.

Clearing in country drinking water catchments

- (11) Within declared country drinking water catchments, a person may not clear more than 0.2 hectares without first obtaining a licence to do so from the Water and Rivers Commission.^{vii} A maximum fine of \$2 000, and a court order requiring revegetation of the area in question or an equivalent area, may be imposed if this requirement is breached.^{viii} In contrast to the position with clearing controls outside drinking water catchments, a person may apply for compensation in cases where he or she has been refused permission to clear. In assessing an application for compensation, regard must be had “to the requirement that not less than one-tenth part of the land in question should, in the interests of good agricultural and conservation practice, be left under tree cover

including the indigenous undergrowth” and no compensation is payable for clearing of vegetation falling into that category.^{ix}

Clearing in urban areas

(12) In urban areas, there is no requirement to seek consent for proposed clearing, and the requirement in the *Soil and Land Conservation Regulations* to notify proposed clearing is not enforced by the Commissioner.^x However, urban land clearing proposals and their associated biodiversity impacts may be assessed:

∄ as part of a local government’s consideration of an application for development approval under applicable the town planning scheme;

∄ as part of the Western Australian Planning Commission’s (“WAPC’s”) consideration of an application for development approval under the Metropolitan Region Scheme or other regional scheme;

∄ as part of the WAPC’s consideration of a subdivision application; or

∄ as part of an environmental impact assessment carried out by the EPA.

(13) One of the main difficulties with these controls is that they do not directly address the issue of land clearing. In urban areas, there is no requirement that consent be obtained for proposed clearing, or even that an intention to clear be notified. Town planning schemes generally provide that “development” may only be undertaken with the consent of the local government, but it is unusual for schemes to expressly define development as including clearing. In the usual case in which clearing is not expressly dealt with by a town planning scheme it is by no means clear that clearing will in itself amount to “development”.^{xi}

(14) What can be said is that some proposals involving clearing will not require development approval. This is because there are a number of exceptions to the general rule that consent is required for development. Perhaps the most important of these is the exemption that applies, in respect of town planning schemes, to “public works.”^{xii} This exemption means,

for example, that clearing for road construction by a local government or the Main Roads Department does not need development approval by the local government. The public works exemption has even been applied to a proposal to construct a motor sports complex, on the basis that the complex was being developed by the Western Australia Sports Centre Trust in furtherance of its statutory functions.

- (15) Another problem is the lack of any consistent requirement to protect the biodiversity values of urban bushland. In respect of town planning schemes, the Model Scheme Text contains the minimalist requirement that local governments have “due regard” in “appropriate cases” to the “likely effect of a development proposal on the natural environment and any means that are proposed to protect or to mitigate impacts on the natural environment”.^{xiii} In respect of subdivision approvals, the situation is even worse. The WAPC is bound to consider a range of matters in making a subdivision decision, such as access to lots, the provision of services to lots, and the amount of public space to be provided.^{xiv} However it is under no obligation to consider the environmental impacts of clearing. This is despite the fact that a standard subdivision approval functions as a deemed development approval under which the landowner can carry out clearing associated with the building of access roads.^{xv}
- (16) These deficiencies are ameliorated to some extent by the environmental impact assessment process established by Part IV of the *Environmental Protection Act 1986*. Section 38(1)(a) of that Act provides that a decision-making authority must refer to the EPA any proposal that appears likely, if implemented, to have a significant effect on the environment. Such decision-making authorities include local governments considering development approval applications and the WAPC when it considers subdivision approval applications. While an assessment takes place, that decision-making authority may not make a decision that would allow the proposal to be implemented. The environmental impact assessment process may result in the Minister for the Environment finding, on the advice of the EPA, that a proposal to clear urban bushland should not proceed. Thus the defects in the primary approval processes are compensated for, to some extent, by an overriding environmental impact assessment process. However, the vagueness of the trigger for referral and the reality that the EPA can assess only the most important proposals in the State means that the environmental impact assessment process is not sufficient to plug the gaps in the planning and subdivision approval process.

Clearing associated with mining operations

- (17) While agriculture and urban development are the main sources of land clearing, there are others. Mining operations obviously involve clearing. The standard process for regulating such clearing is somewhat unusual. It involves the grant of a mining lease before any assessment of the impacts of mining operations, but with a condition on the mining lease requiring the leaseholder to seek the further permission of the State Mining Engineer before undertaking any productive mining operations. When seeking this permission, the leaseholder will submit a notice of intention to clear under the *Soil and Land Conservation Regulations*. That notice of intent to clear is lodged with the State Mining Engineer, who has delegated powers from the Commissioner for Soil and Land Conservation (with an associated broad discretion) to receive and deal with the application.^{xvi} Before the State Mining Engineer makes a final decision the proposed clearing, along with other aspects of the mining operation, may be subject to environmental impact assessment by the EPA. It should be noted that mining operations and associated land clearing do not require development approval under local town planning schemes,^{xvii} although somewhat anomalously they do require such approval under the Perth metropolitan region scheme.^{xviii} It should also be noted that clearing for quarrying operations on private land is regulated by a mix of planning laws and the clearing controls applying to clearing under the *Soil and Land Conservation Act*.^{xix}

Clearing on Crown land

- (18) Land clearing will sometimes occur on Crown land, in circumstances in which it is not regulated under the rules relating to clearing for agriculture, urban development or mining that have been discussed above. For example, an area that is held under a lease from the Crown may be developed for a tourist resort in circumstances in which there is no applicable town planning scheme. In these circumstances, one control on land clearing is imposed by the *Land Administration Act 1997*, which provides that it is an offence, without permission from the Minister for Lands or reasonable excuse, to clear Crown land.^{xx} Another control is found in the *Wildlife Conservation Act 1945*, which prohibits the clearing of indigenous flora on Crown land. On the face of it, a notice of intent to clear would also need to be submitted to the Commissioner for Soil and Land

Conservation, if more than one hectare was to be cleared. Again, for significant proposals it is possible that the EPA will decide to assess the proposal.

Clearing on areas under pastoral lease

(19) Section 109(1) of the *Land Administration Act 1997* provides that a pastoral lessee must not remove trees or otherwise clear land under the lease or disturb or affect its soil except:

⊄ as permitted under the lease;

⊄ as necessary for the construction of improvements permitted under the lease; or

⊄ in accordance with a permit issued under Division 5.

(20) A failure to comply with this provision may attract a maximum fine of \$10,000.^{xxi} Perhaps more significantly, a pastoral lessee who has contravened section 109(1) must restore the land and vegetation to the satisfaction of the Pastoral Lands Board.^{xxii}

(21) The *Land Administration Act 1997* provides that the Pastoral Lands Board may, on an application in writing from a pastoral lessee, issue a permit for the lessee to remove specified trees or clear specified areas of scrub or other vegetation for the purpose of promoting the growth of indigenous pasture or otherwise facilitating or improving the working of the lease.^{xxiii}

Some conclusions

(22) It is clear from the above that there is presently no uniform process governing land clearing. The result is that clearing proposals are dealt with differently, depending on arbitrary factors not related to the environmental impacts of the clearing.

(23) Further, there are significant gaps in the various clearing laws, such as where agricultural clearing has been notified and 90 days has elapsed without a soil conservation notice having been imposed, or where clearing is undertaken for a public work.

- (24) Penalties are clearly inadequate in many cases. In particular, the maximum \$2,000 fine for agricultural clearing does not provide a sufficient deterrent to prevent unauthorised clearing.
- (25) Finally, there is no guarantee that biodiversity values will be properly assessed by decision-makers, because the various laws do not impose any requirement to consider such values. In the case of the Commissioner for Soil and Land Conservation the situation is even worse - it is beyond the power of the Commissioner to have regard biodiversity values in reaching a decision as to whether a soil conservation notice should be imposed.

C. A PROPOSAL FOR REFORM

- (26) It is clear from the above analysis that reform of existing laws relating to land clearing is required. This section puts forward an option for law reform that, if implemented, would remedy the problems identified at paragraphs (22) to (25) above.
- (27) It is recommended that the *Environmental Protection Act 1986* (henceforth “the Act”) be amended to provide that clearing of more than 0.2ha of indigenous vegetation is an offence. The maximum penalties for committing this offence should be equivalent to those currently applying to pollution offences, which include substantial fines and imprisonment. Orders for revegetation and rehabilitation should also be available. I note that the power to require revegetation and rehabilitation would not require any amendment to the Act, as it is already present in section 99X.
- (28) The reform referred to in the preceding paragraph could form part of the proposed “environmental harm” amendments to the Act, as long as clearing of more than 0.2ha of indigenous vegetation is expressly included within the definition of environmental harm.
- (29) The Act should provide that the general prohibition on the clearing of indigenous vegetation should be able to be lifted by the issuing of a licence by the Department of Environmental Protection (“DEP”). However, the Act should also provide that the DEP may not issue a licence for proposed clearing where that clearing would involve the

clearance of ecological communities with an extent below 30 per cent of that present pre-1750. This would meet the target set by paragraph 1.1.2 of *National Objectives and Targets for Biodiversity Conservation 2001-2005*.^{xxiv}

- (30) The Act should provide that the DEP may attach conditions to a licence to require offset arrangements to be entered into. The purpose of such a provision would be to ensure that there is no net loss of native vegetation from clearing activity entered into after the amendments to Act come into force. The provision should be wide enough to require the making of a contribution towards the conservation of large areas off-site of native vegetation, as well as to the protection of native vegetation on the land of the licence holder.
- (31) The Act should be amended to provide that any person may apply for injunctive relief to restrain a threatened breach of the Act, including a breach of the prohibition on clearing of native vegetation.
- (32) While not part of the proposed amendments to the Act, it is recommended that the Government consider establishing a scheme to provide financial assistance in appropriate cases to those industries that are particularly affected by the reforms. That assistance should be provided on an interim basis to assist in restructuring, rather than being paid in the form of compensation for real or perceived loss of property rights.
- (33) It is also acknowledged that the protection of native vegetation is, in itself, not sufficient to meet biodiversity conservation objectives. The management and restoration of native vegetation is also required. In this area, the focus needs to be less on “command and control” mechanisms and more on the use of incentives to promote positive action.^{xxv}

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Appendix A
Regulation of Agricultural Land Clearing
Outside Declared Drinking Water Catchments

- Step 1**
Notification
- An owner or occupier of land who proposes to clear more than one hectare of that land must, where that clearing will result in “a change in the use of that land”, give 90 day’s prior notice to the Commissioner for Soil and Land Conservation of that intention to clear.^{xxvi} A maximum fine of \$2000 may be imposed for a breach of this requirement.^{xxvii}
- Step 2**
Possible objection by Commissioner
- The Commissioner for Soil and Land Conservation may object to the proposed clearing on the grounds that land degradation is liable, or likely to become liable, to occur on that land or elsewhere.^{xxviii} “Land degradation” is defined in a manner that focuses on the productive capacity of the land rather than its biodiversity values.^{xxix} For a time the Commissioner took the view that there would be an unacceptable risk of land degradation in local government districts with less than 20% remnant vegetation.^{xxx} The Commissioner now takes the view that landholders must prove that any proposed land clearing will not cause land degradation.^{xxxi}
- Step 3**
Possible EPA assessment
- The Commissioner is obliged to refer to the Environmental Protection Authority any proposal which is likely, if implemented, to have a significant effect on the environment.^{xxxii} In practice, all clearing proposals that are not objected to by the Commissioner will go before a working group which includes an officer from the Department of Environmental Protection.^{xxxiii} This working group will advise the Commissioner whether a referral is appropriate.
- Once a clearing proposal is referred to the EPA, the EPA must decide whether it should undertake an environmental impact assessment. If it does so, it will prepare a report for the Minister for the Environment that considers environmental factors relevant to the proposal and makes any recommendations the EPA thinks fit to include.^{xxxiv} With its respect to

clearing proposals, the EPA will be guided in practice by a Position Statement entitled *Environmental Protection of Native Vegetation in Western Australia*.^{xxxv} This Position Statement indicates that the EPA is particularly reluctant to recommend that agricultural clearing proposals proceed, given the extent of clearing to date.^{xxxvi} It also includes the requirements, applicable to clearing generally, that:

€ “there would be an expectation that a proposal would demonstrate that the vegetation removal would not compromise any vegetation type by taking it below the 30% of the pre-clearing extent of the vegetation type”; and

€ “where a proposal would result in a reduction below the 30% level, the EPA would expect alternative mechanisms to be put forward to address the protection of biodiversity.”

Once the Minister for the Environment has received the EPA’s report, he or she will determine whether the proposal should proceed, and if so on what conditions.^{xxxvii}

Step 4 Action by other agencies may be taken in some circumstances where the
Possible action by EPA decides not to assess a clearing proposal. For example, in cases in
other agencies which declared rare flora is present, it will be an offence to “take” that flora without approval from the Minister for the Environment under the Wildlife Conservation Act.

Endnotes

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- ⁱ See *Soil and Land Conservation Act 1945*, s.31, 4 (definition of “land degradation”).
- ⁱⁱ Hon. Christine Sharp to the Minister for Housing representing the Minister for the Environment and Heritage, Legislative Council, 31 July 2001.
- ⁱⁱⁱ McKenzie and Madgwick, *Vegetation Clearance – Western Australia: A case study on vegetation clearance in the West Midlands Region of Western Australia* (WWF Perth, September 2001), page 7.
- ^{iv} Pers. Comm., Chris Tallentire, 12 October 2001.
- ^v Government of WA, *Final Report of the Native Vegetation Working Group*, 25 January 2000, p.14.
- ^{vi} This view is based upon section 17(4) of the *Soil and Land Conservation Act 1945*, which provides that “The Commissioner shall consult with any government department or public authority undertaking any work likely to cause land degradation or to prejudice any project being undertaken under the authority of this Act, and where agreement cannot be reached between the Commissioner and a Government department or a public authority, the Commissioner shall submit to the Minister a full report of the circumstances.”
- ^{vii} *Country Areas Water Supply Act 1947*, s.12B.
- ^{viii} *Country Areas Water Supply Act 1947*, s.12B(2).
- ^{ix} *Country Areas Water Supply Act 1947*, s 12E(1).
- ^x The obligation imposed by regulation 4(1) of the *Soil and Land Conservation Regulations 1992* to notify proposed clearing does not limit its application to rural areas. Indeed, it refers quite clearly to “any land in the State.” However, the Commissioner for Soil and Land Conservation has decided that for policy reasons it is preferable for controls on urban clearing to be applied under the *Town Planning and Development Act 1928* and *Environmental Protection Act 1986*, and accordingly regulation 4(1) is not enforced in urban areas: pers. comm., Jean-Pierre Clement, Agriculture Western Australia, 23 September 2001.
- ^{xi} There has as yet been no judicial consideration of the point. There is authority for the view that the “development...of...land” encompasses activities that result in some physical alteration of the land which has some degree of permanence to the land itself *University of WA v City of Subiaco* (1980) 52 LGRA 360 at 364 per Burt CJ, citing *Parkes v Environment Secretary* (1978) 1 WLR 1308 at 1211 per Lord Denning. This would support the view that clearing on a substantial scale would amount to development, but the issue is by no means beyond doubt.
- ^{xii} *Town Planning and Development Act 1928*, s.32. This exemption does not apply in cases in which the development approval is required under the Metropolitan Region Scheme, as opposed to under a local town planning scheme: *City of Bayswater v Minister for Children and Family Services* [2000] WASCA 151.
- ^{xiii} *Town Planning Regulations 1967*, Appendix B, s.10.2(1).
- ^{xiv} *Town Planning (Subdivision) Regulations 2000*, reg. 5.
- ^{xv} A standard subdivision approval for a residential subdivision contains conditions designed to ensure vehicular access for the new lots: see WAPC, *Policy DC.1 – Subdivision of Land – General Principles*, part 2. Section 20D of the *Town Planning and Development Act* provides that such a condition operates as a deemed approval by the responsible authority under the town planning scheme of the development which is, in the opinion of the Commission, necessary or desirable for compliance with the condition. Of course, the conditions of subdivision may impose some restriction on when roadworks may be carried out. For example, there may be a requirement that plans of the proposed roadworks be approved by the local government before they are implemented.
- ^{xvi} Agriculture Western Australia, *Annual Report 1999-2000*, p.65.
- ^{xvii} *Mining Act 1978*, s120.
- ^{xviii} *City of Cockburn v Boral Resources (Australia) Ltd* (1997) 97 LGERA 232.
- ^{xix} This is because the *Mining Act 1978* (WA) only applies to “minerals” as defined in that Act. “Minerals” is defined to exclude certain rocks, such as limestone, rock or gravel, on private land: s.8
- ^{xx} *Land Administration Act*, s267(2)
- ^{xxi} *Land Administration Act 1997*, s 109(1).
- ^{xxii} *Land Administration Act 1997*, s 109(2).
- ^{xxiii}^{xxiii} *Land Administration Act 1997*, s.118.
- ^{xxiv} *National Objectives and Targets for Biodiversity Conservation 2001-2005* (Environment Australia, 2001), accessible at <http://www.ea.gov.au/biodiversity/publications/objectives/>.
- ^{xxv} See generally ANZECC, *National Framework for the Management and Monitoring of Australia’s Native Vegetation*, pp 26-31 Young et al., *Reimbursing the Future: an evaluation of motivational*,

voluntary, price-based, property-right, and regulatory incentives for the conservation of biodiversity (Environment Australia, 1996).

^{xxvi} *Soil and Land Conservation Regulations 1992*, regulation 4(1).

^{xxvii} *Ibid.*

^{xxviii} *Soil and Land Conservation Act 1945*, s 32(1).

^{xxix} *Soil and Land Conservation Act 1945*, s 4: “Land degradation” includes —

- (a) soil erosion, salinity, eutrophication and flooding; and
 - (b) the removal or deterioration of natural or introduced vegetation,
- that may be detrimental to the present or future use of land.

^{xxx} *Memorandum of Understanding for the Protection of Remnant Vegetation on Private Land in the Agricultural Region of Western Australia*, between the Commissioner for Soil and Land Conservation, Environmental Protection Authority, Department of Environmental Protection, Agriculture Western Australia, Department of Conservation and Land Management and Water and Rivers Commission, Perth, 1997, p.4.

^{xxxi} *Ibid.*

^{xxxii} *Environmental Protection Act 1986*, section 38(1)(a).

^{xxxiii} *Memorandum of Understanding for the Protection of Remnant Vegetation on Private Land in the Agricultural Region of Western Australia*, between the Commissioner for Soil and Land Conservation, Environmental Protection Authority, Department of Environmental Protection, Agriculture Western Australia, Department of Conservation and Land Management and Water and Rivers Commission, Perth, May 2000, p.6.

^{xxxiv} *Environmental Protection Act*, s44(1).

^{xxxv} EPA, *Environmental Protection of Native Vegetation in Western Australia: Native Vegetation Clearing in Western Australia, with Particular Reference to the Agricultural Area (Position Statement No. 2)*, December 2000.

^{xxxvi} *Ibid.*, pp7-8.

^{xxxvii} *Environmental Protection Act 1986*, s45.