

NEW CLEARING LAWS PROPOSED FOR WESTERN AUSTRALIA

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Western Australia currently has a patchwork of different laws relating to land clearing, which vary depending on arbitrary factors such as where the clearing takes place, the tenure of the land in question and the purpose of the clearing¹. The *Environmental Protection Amendment Bill 2002* (the Bill)² proposes to repeal these laws and to implement a single land clearing regulatory system under the *Environmental Protection Act 1986* (the Act).

What will the new clearing laws cover?

The Bill proposes that "clearing" will be any act that causes the death, destruction, removal of, or substantial damage to, some or all of the native vegetation in an area. "Clearing" is defined to include severing or ring-barking trunks or stems, draining or flooding land, burning, and grazing of stock. The definition of "native vegetation" will include indigenous aquatic or terrestrial vegetation, but will not include vegetation in a plantation.

Unlike WA's current clearing laws, the Act will apply to most areas of land and water in WA, including rural land, urban land, Crown land, roadside vegetation, pastoral leases, land the subject of a mining tenement and land the subject of public works.

When will clearing be allowed?

The Bill proposes that it will be unlawful for any person to clear native vegetation unless that person:

- 1) Has a "clearing permit";
- 2) Has other "lawful authority"; or
- 3) Clears under a specific exemption provided by regulations (yet to be finalised).

An individual may be fined up to \$250,000 for unlawful clearing, with a maximum additional fine of up to \$50,000 for each day they continue to clear. A corporation may be fined up to \$500,000 for unlawful clearing with a maximum additional fine of up to \$100,000 for each day it continues to clear³.

Clearing permits

The Bill proposes that there be two types of clearing permits; area permits and purpose permits⁴. Area permits will be issued for clearing on particular land and can only be

¹ See article *Land clearing: reforming the law in WA* by Michael Bennett published in Impact No 65 March 2002

² The Bill was introduced into WA State parliament on 27 June 2002.

³ Proposed Schedule 1 item 8D *Environmental Protection Act 1986*

⁴ Proposed section 51E *Environmental Protection Act 1986*

issued to the owner of the land or someone acting on the owner's behalf. Area permits will be valid for a maximum of two years⁵. Purpose permits will be issued for clearing in various different areas for a particular purpose and can only be issued to the person on whose behalf the clearing will be done. Purpose permits will be valid for a maximum of five years⁶.

All applications for clearing permits must be made to the Chief Executive Officer of the Department of Environmental Protection ("CEO")⁷. Once the CEO has received an application, the CEO must invite any public authority or person who has a "direct interest" in the subject matter of the application to comment on the application⁸. A person will probably have a "direct interest" in the clearing if they are a neighbouring or downstream landowner, or if they have private interests which will be affected by the clearing. The CEO will decide in each individual case whether or not a person has a "direct interest".

How will the decision be made?

Clearing permits will only be able to be issued by the CEO⁹. In deciding whether to issue a permit, the CEO must:

- ∄ Take into account any comments received from those invited to comment on the application;
- ∄ Have regard to the "clearing principles"¹⁰ (the principles are set out in the proposed Schedule 5 of the Act);
- ∄ Have regard to any relevant town planning scheme, or any strategy, policy or plan made or adopted under a scheme¹¹;
- ∄ Have regard to any Statement of Planning Policy¹² (for example, the *Leeuwin-Naturaliste Ridge Statement of Planning Policy*);
- ∄ Have regard to any local planning strategy¹³; and
- ∄ Ensure that the permit is consistent with any Environmental Protection Policy¹⁴.

After considering the above, the CEO will be able to either refuse to grant the permit, grant the permit on conditions, or simply grant the permit. The CEO may only make a decision that is seriously at variance with the "clearing principles" if, in the CEO's opinion, there is a good reason for making that decision¹⁵, in which case the CEO must

⁵ Proposed section 51G *Environmental Protection Act 1986*

⁶ Proposed section 51G *Environmental Protection Act 1986*

⁷ Proposed section 51E *Environmental Protection Act 1986*

⁸ Proposed section 51E *Environmental Protection Act 1986*

⁹ Proposed section 51E *Environmental Protection Act 1986*

¹⁰ Proposed section 51O, Proposed Schedule 5 *Environmental Protection Act 1986*

¹¹ Proposed section 51O *Environmental Protection Act 1986*

¹² Proposed section 51O *Environmental Protection Act 1986*. Statements of Planning Policy are non binding statutory policies made under the *Town Planning and Development Act 1928* (WA).

¹³ Proposed section 51O *Environmental Protection Act 1986*

¹⁴ Proposed section 51P *Environmental Protection Act 1986*. Environmental Protection Policies are binding statutory instruments made under Part III of the *Environmental Protection Act 1986*.

¹⁵ Proposed section 51O *Environmental Protection Act 1986*

publish reasons for that decision¹⁶. Further, the CEO must not issue a clearing permit if the associated effect on the environment would be inconsistent with and provide less protection than any Environmental Protection Policy¹⁷.

Will a permit be conditional?

If the CEO decides to issue a clearing permit, the CEO will be able to make the permit subject to any conditions which the CEO considers are necessary or convenient for controlling environmental harm or offsetting the loss of vegetation¹⁸. For example, the CEO will be able to impose a condition requiring the permit holder to plant vegetation in other areas, to monitor operations, to conduct risk assessment, to enter into a conservation covenant or agreement to reserve, or to implement an environmental management system¹⁹. The CEO will also have the power to require a person to make contributions to a fund for the purpose of establishing or maintaining vegetation and to amend the conditions of a clearing permit once it is issued²⁰.

What happens if permit conditions are breached?

If the holder of a clearing permit contravenes a condition of a clearing permit (or a condition of a conservation covenant or agreement to reserve referred to in the permit), they will commit an offence²¹. An individual may be fined up to \$62,500 for this offence with a maximum additional fine of up to \$12,500 per day if they continue the offence. A corporation may be fined up to \$125,000 for this offence with a maximum additional fine of up to \$25,000 per day if it continues the offence²².

The CEO will also have the power to revoke or suspend a clearing permit if the permit holder has breached a permit condition²³.

Appeals to Minister about clearing permits

Any person who is not satisfied with the CEO's decision:

- ∄ To issue a clearing permit;
- ∄ About a condition of the permit; and/or
- ∄ To transfer, amend, revoke or suspend a clearing permit;

¹⁶ Proposed section 51Q *Environmental Protection Act 1986*

¹⁷ Proposed section 51P *Environmental Protection Act 1986*

¹⁸ Proposed section 51H *Environmental Protection Act 1986*

¹⁹ Proposed section 51I *Environmental Protection Act 1986*

²⁰ Proposed section 51K *Environmental Protection Act 1986*

²¹ Proposed section 51J *Environmental Protection Act 1986*

²² Proposed Schedule 1 item 1E *Environmental Protection Act 1986*

²³ Proposed section 51L *Environmental Protection Act 1986*

will be able to appeal to the Minister for the Environment in writing within 21 days of that decision²⁴.

Clearing permits and environmental impact assessment

If a proposal is the subject of a formal environmental impact assessment under the Act, the CEO will not be able to consider an associated application for any clearing permit until the Minister for the Environment has made a decision on the proposal²⁵. Any decision that the CEO makes about the clearing permit must then be in accordance with the Minister's decision.

Lawful authority

A clearing permit will not be required if clearing is carried out in accordance with another "lawful authority"²⁶. Proposed Schedule 6 of the Act sets out many types of "lawful authorities, which include:

- ∄ A subdivision approval;
- ∄ Approval for a building (if the clearing is within the building envelope);
- ∄ Decisions made by the Minister for the Environment after a proposal has been the subject of a formal environmental impact assessment under the Act;
- ∄ Development approval issued under a town planning scheme that has been the subject of a formal environmental impact assessment under the Act;
- ∄ Management of land by the Department of Conservation and Land Management in accordance with a Forest Management Plan²⁷;
- ∄ A works approval or licence issued under the Act;
- ∄ A road or production contract with the Forest Products Commission²⁸; and
- ∄ Clearing for certain purposes under the *Bush Fires Act 1954* (WA).

Vegetation conservation notices

The Bill proposes to create "vegetation conservation notices" - notices that require a person to repair damage, re-establish vegetation or prevent erosion²⁹. A vegetation conservation notice can be issued to any person by the CEO if the CEO suspects on reasonable grounds that that person has, or is likely to, carry out unlawful clearing. Before the CEO can give a person a vegetation conservation notice, the CEO must give that person a chance to make submissions as to why a notice should not be issued. Once

²⁴ Proposed section 101A *Environmental Protection Act 1986*

²⁵ Proposed section 51F *Environmental Protection Act 1986*. Note that any person can refer a matter to the Environmental Protection Authority to formally assess a proposal.

²⁶ Proposed Schedule 6 *Environmental Protection Act 1986*

²⁷ The Department is responsible for managing all conservation estate and State forests/timber reserves in WA and must do so in accordance with any management plan in place for the area: *Conservation and Land Management Act 1984* (WA).

²⁸ The Forest Products Commission is responsible for entering into contracts for the sale of forest produce in WA: *Forest Products Act 2000* (WA).

²⁹ Proposed section 70 *Environmental Protection Act 1986*

issued, a vegetation conservation notice can be registered on the title to any land, in which case it will bind successive landowners.

Clearing injunctions

The Bill also proposes to create “clearing injunctions” - orders of the Supreme Court that prohibit a person from being involved in unlawful clearing. The CEO can apply for a “clearing injunction” from the Court if the CEO suspects that a person is involved in, or will be involved in, unlawfully clearing native vegetation³⁰.

Clearing may be “environmental harm”

The Bill proposes to make it a broad offence to cause “environmental harm”. Environmental harm will include removal, destruction of, or damage to, native vegetation or habitat of native vegetation. There are two types of environmental harm – “material environmental harm” and “significant environmental harm”. Material environmental harm will be caused when it would cost more than \$20,000 to restore the environmental harm. Significant environmental harm will be caused when it would cost more than \$100,000 to restore the environmental harm. The maximum penalty for causing environmental harm with intent or criminal negligence is \$1,000,000 for a corporation and \$500,000 for an individual.

Conclusion

The Bill proposes a long overdue consistent and comprehensive approach to the regulation of land clearing in WA. However, there are some deficiencies in the proposed system. For example;

- ∅ There are very limited opportunities for the public to be involved in either the grant of clearing permits (other than formal appeals to the Minister) or the taking of enforcement action about unlawful clearing.
- ∅ When deciding whether to issue a clearing permit, the CEO must have regard to both the clearing principles and relevant planning instruments. Any conflict between these instruments will be solely at the discretion of the CEO.
- ∅ The “lawful authorities” described under the Bill may exempt some substantial clearing from assessment and regulation.

Please note that this article is based on the Bill as it was introduced into State Parliament on 27 June 2002. As the Bill is currently being examined by Parliament, any legislation which is eventually passed may in fact be different from that currently in the Bill.

³⁰ Proposed section 51S *Environmental Protection Act 1986*