



# Factsheet

## 7. Clearing Native Vegetation

Clearing of native vegetation is one of the major causes of biodiversity loss in Western Australia. It also contributes to other environmental problems, such as salinity, erosion and invasive species.

Changes to the Environmental Protection Act 1986 ("the Act"), relating to the protection of native vegetation, came into force on 8 July 2004. Initial responsibility for regulating the clearing of native vegetation in Western Australia fell to the Department of Environment and Conservation. A subsequent administrative agreement has seen the Department of Industry and Resources assume responsibility for the administration, assessment and approval of clearing for mineral and petroleum activities.

This fact sheet examines the laws relating to clearing of land including the permit system and vegetation conservation notices. Information on what to do if you suspect that unlawful clearing is happening is contained at the end of this fact sheet.

See also Fact Sheet 9: Biodiversity Conservation under Commonwealth Law and Fact Sheet 14: Conservation Covenants.



### What is clearing?

"Clearing" is defined as any act that kills, removes or substantially damages native vegetation in an area. It includes severing or ringbarking of trunks or stems, draining or flooding land, burning, and grazing of stock.



### What vegetation is protected?

The laws apply only to "native vegetation", which is defined to mean any living or dead indigenous aquatic or terrestrial vegetation (including native seagrasses). It does not include vegetation in a plantation.

The definition includes native vegetation that has been intentionally planted for biodiversity or land conservation purposes where the planting was undertaken with funds from a person other than the owner of the land (for example, conservation plantings partly funded by the Natural Heritage Trust). It also includes native vegetation that is protected under a conservation covenant or other binding agreement.



### What areas are covered by the clearing laws?

The Act applies to all land in the State, including rural land; urban land; Crown land; roadside vegetation; pastoral leases; land the subject of a mining lease; and land the subject of public works. The only land that may not be subject to the new laws are areas of Commonwealth land (depending on the land in question and the relevant Commonwealth laws), or land which is specifically declared by the Environment Minister to be excluded.

The Act applies to all waters in the State, including rivers, streams, wetlands, dams and all other natural and artificial watercourses and waterbodies. It also applies to coastal waters, which generally encompasses marine areas within three nautical miles of the low tide mark.

In other words, the clearing laws apply across the whole State, and its inshore areas and islands, unless Federal laws or Ministerial directions provide otherwise.

#### Important disclaimer:

This Fact Sheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your specific circumstances you should contact the Environmental Defender's Office WA (Inc) or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any error in this Fact Sheet.

## Restrictions on clearing native vegetation

It is illegal for any person to clear native vegetation unless:

1. the person has a permit to clear; or
2. the activity is of a kind that is exempt from the clearing laws.

A 'person' includes a public authority, such as a government department or a local government.

The penalty for illegally clearing is a fine of up to \$250,000 for an individual and \$500,000 for a body corporate. There are also daily penalties of up to \$50,000 for an individual and \$100,000 for a body corporate. The directors and managers of a corporation are taken to be liable for the same offence as that corporation unless they establish one of the defences in the Act, such as the "due diligence" defence.

## Exempt clearing

### Schedule 6 exemptions

The first types of exemptions are described in Schedule 6 of the Act. These exemptions generally relate to activities that are authorized under another written law. Examples include:

- clearing that is caused by the grazing of stock on land held under a pastoral lease;
- clearing authorized under a licence issued by the Department of Environment and Conservation for the taking of protected flora;
- clearing that is done in accordance with a works approval or licence issued by the Department of Environment and Conservation.

### Prescribed clearing

Regulation 5 of the Environmental Protection (Clearing of Native Vegetation) Regulations 2004 ("the Regulations") contains a further set of exemptions. Examples of the types of activities exempt under the Regulations include the taking of firewood and construction of tracks and clearing of fence lines as well as low impact mineral or petroleum activities. Note that some of these exemptions limit the amount of clearing for any purpose to an aggregate of one hectare per landholder per financial year. Full details of the types of exemptions and the restrictions applying can be found on the Department of Environment and Conservation's website.

Unlike the Schedule 6 exemptions contained in the Act, the exemptions under the Regulations do not apply where the activity is proposed to be taken under an 'environmentally sensitive area'. These include areas such as within 50 metres of protected wetlands, 50 metres of declared rare flora and those areas covered by a threatened ecological community. Further information on environmentally sensitive areas is available from the Department of Environment and Conservation.

### Transitional exemptions

Currently transitional exemptions also exist if the clearing is done, for exploration, under existing petroleum and mineral legislation. Exemptions do not apply in environmentally sensitive areas. The transitional exemptions extend until July 2007 when, it is predicted, the Department of Industry and Resource will assume full control of resource applications and transitional exemptions will expire.

Note that the above date has already been extended by two years from the initial timeframe. Check with the Department of Industry and Resources for up to date information.

 **Clearing permits**

If the activity is not exempt, under either the Act or the Regulations, then the person proposing to clear native vegetation must obtain a clearing permit. For activities relating to mineral and petroleum the application will be made to the Department of Industry and Resources, for all other activities the application will be made to the Department of Environment and Conservation. There are two types of clearing permits: area permits and purpose permits.

**Area permits**

Area permits are “one-off” permits issued for clearing of a particular area and can only be issued to the owner of the land or someone acting on the owner’s behalf, or by a person who is likely to become the owner of the land on which the clearing is proposed to be done. Area permits are generally valid for a maximum of two years. Examples of the types of activity that would require an area permit include:

- burning native vegetation for to aid stock mustering;
- clearing native vegetation to expand an agricultural or pastoral activity;
- removing seagrass from within coastal waters.

**Purpose permits**

Purpose permits are issued for clearing in various different areas from time to time for a particular purpose and can only be issued to the person by, or on whose behalf, the clearing will be done. Purpose permits are generally valid for a maximum of five years. A purpose permit allows a permit holder to undertake a program of works over a period without having to apply for a separate area permit on each occasion native vegetation is proposed to be removed. Examples of the types of activities that will be subject to purpose permits include:

- local governments undertaking road works;
- mining companies maintaining a network of roads and railway corridors;
- Western Power installing new power transmission lines.

 **How are clearing permits obtained?**

All applications for clearing permits must be made to either the Department of Industry and Resources (for mineral and petroleum activities) or the Department of Environment and Conservation. All applications must be accompanied by the prescribed fee, management plans, maps and other supporting information. Applications to both Departments will be in the form prescribed by the Chief Executive Officer of the Department of Environment and Conservation (“CEO”).

 **Who can comment on applications?**

Once an application is received, the relevant Department must invite comments from any public authority, or person who has a “direct interest” in the subject matter of the application. A person will probably have a “direct interest” in the clearing if they are a neighbouring or downstream landowner, or have private interests which will be affected by the clearing.

In addition, the relevant Department must publicly advertise the application in a State newspaper, while all current clearing permits will be listed on the Department of Environment and Conservation’s website. This process allows any other person who wishes to comment the opportunity to do so.

## What matters must be taken into account before granting a permit?

In deciding whether to issue a permit, the relevant Department must:

- Take into account any comments received from those invited to comment on the application;
- Have regard to the “clearing principles” where relevant (see insert);
- Have regard to any relevant town planning scheme, or any strategy, policy or plan made or adopted under a scheme;
- Have regard to any Statement of Planning Policy (for example, the Leeuwin-Naturaliste Ridge Policy);
- Have regard to any local planning strategy; and
- Ensure that the permit is consistent with any Environmental Protection Policy issued by the Environmental Protection Authority.

### CLEARING PRINCIPLES

Native vegetation should not be cleared if:

- (a) it comprises a high level of diversity of plant species;
- (b) it comprises the whole or part of, or is necessary for the maintenance of, a significant habitat for fauna indigenous to Western Australia;
- (c) it includes, or is necessary for the continued existence of, flora declared to be rare under the *Wildlife Conservation Act 1950*;
- (d) it comprises the whole or part of, or is necessary for the maintenance of, an ecological community declared under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) as threatened, endangered or vulnerable;
- (e) it is significant as a remnant of native vegetation in an area that has been extensively cleared;
- (f) it is growing in, or in association with, an environment associated with a watercourse or wetland;
- (g) the clearing of the vegetation is likely to cause appreciable land degradation;
- (h) the clearing of the vegetation is likely to have an impact on the environmental values of any conservation park, national park, nature reserve, marine nature reserve, marine park or marine management area;
- (i) the clearing of the vegetation is likely to cause deterioration in the quality of surface or underground water; or
- (j) the clearing of the vegetation is likely to cause, or exacerbate, the incidence or intensity of flooding.

After considering the above, the Department can grant the permit, refuse to grant the permit, or grant the permit on conditions. However, the CEO (of the Department of Environment and Conservation) can make a decision which is seriously at variance with the “clearing principles” if, in the CEO’s opinion, there is a good reason for making that decision. The CEO must publish reasons for any decision which is seriously at variance with the clearing principles. In addition, the CEO must not issue a clearing permit if the associated effect on the environment would be inconsistent with any Environmental Protection Policy. Any application that is submitted to the Department of Industry and Resource and is seriously at variance with the “clearing principles’ will be referred to the Department of Environment and Conservation.

## What conditions can be placed on a permit?

Any permit may be made subject to conditions which the Department considers are necessary or convenient for controlling environmental harm or offsetting the loss of vegetation. For example, a condition can be imposed requiring the permit holder to plant in other areas, to monitor operations, to conduct environmental risk assessments, to enter into a conservation covenant or agreement to reserve, or to implement an environmental management system.

It is an offence to contravene a condition of the permit (or a condition of a conservation covenant or agreement to reserve referred to in the permit). 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 the offence continues. The fines are double for corporations. The directors and managers of a corporation are taken to be liable for the same offence as that corporation unless they can establish one of the defences in the Act.

## Can a permit be amended, revoked or suspended?

Each Department has the power to amend the conditions of a clearing permit. For example, any of the conditions of a permit may be removed or varied; the boundaries of an area permit may be redescribed; the procedures that must be followed in a purpose permit may be redescribed; or the duration of the permit may be extended. In exercising power to amend conditions, each Department is bound to take into account the same issues as on the initial grant of the permit. However, they do not have to seek comments from anyone other than the permit-holder about the proposed amendment.

The power exists to revoke, or suspend a clearing permit if a condition of a permit has been breached, or if false or misleading information was provided in the clearing application, amongst other things.

If a Department intends to amend, revoke or suspend a permit, that Department must give the permit holder at least 28 days to make representations to show why the action should not be taken.

## Can a permit be transferred?

If the interest in the land to which an area permit relates is changed, the transfer of an area permit from the holder to another person is authorized only if and when the new owner gives a notice in an approved form to the Department. Failure to send a notice means the permit has no effect.

## Appeals about clearing permits

Any person who is not satisfied with a decision to grant or refuse a clearing permit, or the conditions of a permit may appeal to the Minister for the Environment in writing. Any person who wishes to appeal the grant of the permit has only 21 days to appeal that decision. A permit holder has 28 days from the date of notification to appeal. Any other person who disagrees with any permit conditions or a refusal has 28 days also. A permit holder may also appeal the decision to amend, revoke or suspend a clearing permit, within 28 days. No appeal lies from a correction of a clerical error.

Once an appeal is lodged with the Minister, the Appeals Convenor will request the relevant Department to prepare a report on the matter and consult with the Department and the person who lodged the appeal. The Appeals Convenor can also consult with any other person they think necessary. The Appeals Convenor then makes a report to the Minister, and the Minister makes a decision about the appeal. The holder of a permit that is subject to an appeal cannot undertake any clearing until the appeal has been resolved. There is no appeal against the Minister's decision.



## Record of clearing permits

The Department of Environment and Conservation must keep a record of all clearing permits, applications for clearing permits and transfers of clearing permits. This record includes applications made to the Department of Industry and Resource and available on the Department of Environment and Conservation's website.



## Clearing permits and environmental impact assessment

If a proposal is the subject of an environmental impact assessment under the Act, the Department cannot grant or refuse an application for a clearing permit until the Minister for the Environment has made a decision on the proposal. Any decision which is made about the clearing permit must then be in accordance with the Minister's decision.



## Enforcement mechanisms

### Vegetation conservation notices

The CEO can issue a vegetation conservation notice requiring a person to protect existing native vegetation or re-establish vegetation on an area that has been cleared. A vegetation conservation notice can be issued to any person if it is suspected, on reasonable grounds, that that person has, or is likely to, clear native vegetation without a clearing permit and without a lawful authority. Before the CEO can issue a notice, the person must be given a chance to make submissions as to why a notice should not be issued.

A vegetation conservation notice can be registered on the title to any land, in which case it binds successive landowners. It is an offence not to comply with a vegetation conservation notice. A penalty of up to \$250,000 for an individual and \$500,000 for a body corporate applies.

### Clearing injunctions

A "clearing injunction" is an order of the Supreme Court which prevents a person from illegal clearing. The CEO may apply for a "clearing injunction" from the Court if the CEO suspects that a person is involved in, or will be involved in, clearing native vegetation without a clearing permit and without a lawful authority. It is unlikely that any other person, including any member of the community, can apply for a clearing injunction.

Failing to comply with an injunction could lead to an action for contempt of court, the penalty for which is at the discretion of the court.



## Other laws

### Environmental harm

It is an offence to cause serious or material environmental harm. Penalties of up to \$1 million apply. This offence could apply to clearing that is undertaken without a permit or other lawful authority. For more information, see Fact Sheet 27: Pollution and environmental harm.

### Biodiversity protection

Approval from the Department of Conservation and Land Management is required to remove vegetation on Crown land and to remove rare and endangered flora. For further information on the operation of these laws, see Fact Sheet 8: Biodiversity conservation in Western Australia.

### Planning approval

Proposals to clear native vegetation may also be subject to specific controls under local or regional planning schemes: see Fact Sheet 3: Planning law and Fact Sheet 4: Development controls.

## Land degradation

The Commissioner of Soil and Land Conservation can apply a soil conservation notice where clearing may lead to land degradation. This is not limited to native vegetation, but may apply to other vegetation, the removal of which may cause erosion, salinity or flooding; see Fact Sheet 32: Land degradation.

## Pastoral land management

Proposals to clear native vegetation from a pastoral lease require approval from the Pastoral Lands Board, as do proposals to change the use of a lease to a non-pastoral activity; see Fact Sheet: 34 Pastoral land management.

### How can you become involved?

There are a number of opportunities for public involvement in the protection of native vegetation in Western Australia:

- check the notices of clearing applications in the *West Australian* or on the Departments' websites and make comment on proposals to clear;
- check the register of approvals and see whether the clearing has been authorized, and if so, what conditions apply;
- if you are concerned about the approval of a clearing proposal, lodge an appeal with the Minister for the Environment within 21 days;
- refer major proposals to clear to the Environmental Protection Agency (see Fact Sheet 5: Environmental impact assessment in WA; and Fact Sheet 6: Commonwealth environmental impact assessment);
- report possible illegal clearing to the Department of Environment and Conservation (contact details below);
- encourage your local government to adopt practices which minimize impacts on native vegetation;
- report clearing likely to lead to land degradation to the Commissioner of Soil and Land Conservation (see Fact Sheet 32: Land degradation);
- voluntarily protect native vegetation on land you own by entering into a conservation covenant or other form of agreement protecting the land (see Fact Sheet 14: Conservation covenants).

## Contacts and further information

For emergency reports of clearing, telephone 1800 061 025 or after hours 1800 018 800

Department of Environment and Conservation: Native Vegetation Protection Branch	1800 061 025
Department of Industry and Resources	(08) 9222 3333
Appeals Convenor: Environmental Protection Act	(08) 9221 8711
Environmental Protection Authority	(08) 6364 6500
Commissioner of Soil and Land Conservation (refer Department of Agriculture & Food)	(08) 9368 3282
For copies of legislation considered in this fact sheet, contact the State Law Publisher	(08) 9321 7688

## The Environmental Defender's Office WA (Inc)

The Environmental Defender's Office WA (EDO) is a community legal centre specialising in public interest environmental law.

The objects of the EDO include:

- . to provide community groups and individuals with legal advice and representation to help protect the environment;
- . to promote law reform that improves environmental protection; and
- . to provide community education about environmental law.

The EDO is a non-profit, non-government organisation. The EDO receives its principal funding from the Western Australian Government and the Federal Attorney-General's Department. However, these funds are limited and donations from the public provide a vital source of funds for many of our activities. Donations over \$2 are fully tax deductible. The EDO also welcomes people with a commitment to the environment to join as members.

If you require legal advice on an environmental issue or wish to find out more about the EDO, please contact us at the following address:

**Environmental Defender's Office WA (Inc)**  
**Second Floor, Kings New Office Tower**  
**533 Hay Street, PERTH WA 6000**  
**Tel: (08) 9221 3030 Fax: (08) 9221 3070**  
Email: [edowa@edowa.org.au](mailto:edowa@edowa.org.au) Web: [www.edowa.org.au](http://www.edowa.org.au)

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