

# **Environmental Protection Amendment Act 2003**



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# **Background: why changes were needed**

- Palos Verdes v Carbon (1991): land clearing is not environmental pollution
- New definitions of environmental harm
- Clearing now managed by the Department of Environment instead of the Soils and Lands Commissioner

# Other drivers for change

- Environmental administration changes e.g.
  - Relationship of the Appeals Convenor's Office to the Minister formalized
  - Minister's role in relation to the Chief Executive Officer's discretion to prosecute Tier 1 and Tier 2 offences dispensed with
  - Introduction of modern environmental administration tools such as Financial Assurances, or performance bonds
  - Bilateral agreements with the Commonwealth

# Overview of changes to be discussed

- Environmental harm regulation
- Licensing and works approvals changes
- Enforcement notices
- New statutory tort
- Financial Assurances
- Bilateral agreements
- Strategic and derived proposals for environmental assessment
- Clearing laws
- Appeals convenor changes
- Positives
- Criticisms

# **New concept**

## **Environmental harm**

“environmental harm” means direct or indirect harm to the environment involving removal or destruction of or damage to:

- native vegetation; or
- the habitat of native vegetation or indigenous aquatic or terrestrial animals;
- alteration of the environment to its detriment or degradation or potential detriment or degradation;
- alteration of the environment to the detriment or potential detriment of an environmental value
- alteration to the environment of a prescribed kind.

# Environmental value

- Environmental value is a new term introduced to supplement the existing term 'beneficial use'. The Act used to state that its aim was to protect *beneficial uses of the environment* including protection from emissions and discharges.
- The new term embraces protection of the physical environment itself rather than the use of it by humans, and is to be given effect to by Environmental Protection Policies

# Offences in relation to environmental harm

- Offences created by the Amendment Act of causing serious or material environmental harm: these offences carry heavy penalties under the amended EP Act
- Serious environmental harm is a Tier 1 offence.

# New enforcement tools: notices

- Environmental Protection notices replace pollution abatement notices,
- Closure Notices if ongoing management of a site will be required for authorised premises once the authorisation expires
- Publications of works approvals/licences and clearing permits

# **Stop orders, environmental protection directions, vegetation conservation notices...**

- The CEO may intervene to prevent anticipated pollution or environmental harm by using:
- Stop orders which apply when there is an outstanding EP notice, but
- Vegetation conservation notices and environmental protection directions can be made on an ad hoc basis.
- Environmental Protection Directions by the Minister are broad powers that can apply industry-wide and State-wide.

# Prevention notices

- Prevention notices are like the above-mentioned notices but are designed for a particular premises, and can be commenced by an inspector or authorised person (with the approval of the CEO) rather than the CEO – section 73A.

# Licensing and works approvals – some new kinds of conditions

Occupier of premises may be required to:

- Design and construct plant in a certain way
- Install monitoring equipment, monitor and provide reports on monitoring data
- Take specified risk reduction measures
- Comply with management plans
- Provide audit compliance reports to the CEO
- Prepare and adhere to Environmental Management Systems, safety management systems, environmental improvement systems, and report on same
- Provide waste audits and re-use waste

# Enforcement –virtually no third party enforcement rights

- CEO can enforce the provisions of the Act
- Proceedings have to be brought within 24 months for Tier 2 and Tier 3 offences, but there is no limitation date for Tier 1 offences (c.f. 24 months for all offences under former provisions)
- Exception: private prosecutions may be brought by neighbours for noisiness under section 79

# Defences

- “Old’ Defences to offences under Part V are that:
  - the emission or act occurred for the purpose of preventing danger to human life or health irreversible damage to a significant portion of the environment AND that the occupier took all reasonable precautions to prevent the emission or act AND that the CEO was notified as soon as practicable AND this defence has to be stipulated in writing to the CEO within 21 days of the summons being served
  - OR during emergencies at the discretion of the CEO
  - OR if authorised

# Defences (cont'd)

- “New “ defences to pollution or serious or material environmental harm are that:
  - The defendant was authorised by the implementation decision under section 45 OR
  - In accordance with any other authorisation from a long list identical to Part V defences OR was otherwise authorised and did not contravene any other written law or was empowered by another written law

# Common law rights

- Savings provision: Nothing in the Act affects the rights of any person at law to prevent, control or abate pollution or environmental harm or to obtain damages – s 111.
  - If someone is causing a nuisance, say, through odorous emissions, you can still exercise your rights at law notwithstanding authorisations under this Act such as licences.
  - You can stop a lawful discharge of artificially drained waters across your land (providing your conduct is reasonable) if it is causing damage because rights in nuisance survive

# New tort – s 74B

- If a person bound by a certain kind of notice fails to comply with it and damage is caused to property not owned or occupied by that person that would not have been caused if the notice had been complied with, a new right of action in tort is created for the aggrieved person to sue the person bound by the notice in respect of the damage

# Financial assurances

## New Part VA

- Financial assurances may be required by the Minister in authorising implementation of a proposal under Part IV or a Part V or Part IX authorization
- Financial assurances may be sought by the CEO on the issuing of an EP Notice or a Closure notice, or Prevention notice or a vegetation conservation notice
- The Minister must consent to the imposition of such financial assurances

# Financial assurances (cont'd.)

- Financial assurances do not affect any liability of any responsible person for any penalty for an offence or any other action that might be taken
- If the financial assurance once realized does not cover the full amount of costs concerned the Minister or CEO may recover the excess from the responsible person.

# Bilateral agreements

- The Environmental Protection Authority is now empowered to have regard to a bilateral agreement relating to the EPBC Act when deciding what level of assessment should be used, may also prepare guidelines and publish material as required under the bilateral agreement and may require the proponent of a proposal to do anything to give effect to the bilateral agreement (amongst other things).

# Part IV assessment

- Strategic and derived proposals
- The Amendment Act allows a concept proposal to be assessed once, and then a derived proposal that is a subset of the concept proposal can be **declared**,
- A declared derived proposal means it does not receive any further assessment by the EPA and is approved subject to the same conditions and procedures agreed in relation to the concept proposal.

# Appeals Convenor's role

- The old Appeals Convenor role derived its authority from s 106, which allowed a Minister to set up a committee for hearing appeals. That section has been expanded so that the appeals convenor has the powers of an appeals committee.
- The Office of the Appeals Convenor and the procedures by which appellants were heard were not ever in the EP Act. They will now be the subject of administrative guidelines.

# New third party appeal rights

- An appeal may be lodged by the person bound by an EP notice in relation to any requirement within it and to any amendment made to it. That person has 21 days to lodge such an appeal.
- A third party may within 21 days also appeal a requirement in, or amendment to, an EP notice.

# Clearing under part 9

## **Some results of land clearing in Western Australia ...**

- Up to 450 species of flora face extinction from salinity
- 30% of the Wheatbelt predicted to become salt affected within 50 years
- 30% of rivers in the South West unsuitable for human use, agriculture or industry
- Biodiversity hotspot in the southwest

# What is “clearing”?

- **What is “clearing”?**
- “Clearing” means killing, removing, severing or ringbarking, or doing substantial damage to some or all of the **native vegetation** in an area
- It includes (for example) draining or flooding land, burning and grazing of stock

# What is “native vegetation”?

- “Native vegetation” includes indigenous aquatic or terrestrial vegetation, except in a plantation
- the definition includes dead vegetation (although a specific type of dead vegetation may still be excluded by regulation)
- but for the purposes of the clearing provisions of the EP Act excludes vegetation ‘intentionally sown planted or propagated with a view to commercial exploitation’ unless it was required to be planted by law or falls within a certain class defined by regulation

# What land does the law apply to?

- The laws will basically apply to all land, except:

- Commonwealth land

- Land the Minister orders not to be covered

Certain developments formerly exempted from compliance with the EP Act because of State Agreements to that effect must now comply with the EP Act.

# What controls apply?

It is an offence under the new laws for a person to clear *unless*:

- The person has a **clearing permit**
- The clearing is exempt under **Schedule 6**
- The clearing is exempt under the **Regulations**

# Schedule 6 exemptions

- Broad range of exemptions, including clearing:
  - Required under a law
  - Approved under the *Environmental Protection Act*
  - On CALM managed land
  - Approved by a licence under *Wildlife Conservation Act*
  - In accordance with subdivision approval
  - For specified fire prevention, control and management purposes

# Regulation exemptions

The regulations may list additional exemptions but some examples are:

- Firewood
- Fence posts
- Firebreaks and tracks

# Clearing permits

- Area permits:
  - One off permits for clearing particular land  
Maximum 2 year period
- Purpose permits:
  - For clearing in different areas for a set purpose (e.g. road building)  
Maximum 5 year period

# Matters CEO must take into account in considering permits

- Comments from :
  - Persons with direct interest
  - Public Authorities
  - Persons responding to the advertisement of the application
- Must be consistent with the “clearing principles”
- Must take into account:
  - Statements of Planning Policy
  - Environmental Protection Policies
  - Town Planning Scheme rules

# What are the “clearing principles”?

Native vegetation should **not** be cleared if:

- Comprises high diversity
- Important habitat
- Contains rare flora
- Supports a threatened community
- Significant remnant
- Fringing vegetation for wetland or watercourse
- Land degradation likely
- Impacts on adjacent or nearby conservation area
- Impacts on water quality
- Impacts on incidence or intensity of flooding

# Clearing injunctions

- The CEO may apply to the Supreme court for an injunction to prevent unlawful land clearing
- No undertaking as to damages needs to be given
- The taking of clearing injunction proceedings does not affect liability under the offence provisions of the Act

# Transitional clearing provisions

- During the transitional period from 26 June 2002 and the date the Act comes into operation, if the CEO suspects on reasonable grounds that unlawful clearing took place a notice may be given, and it applies as if it were a vegetation conservation notice. That means the appeal rights, inspection powers, rights of entry, offences and defences apply.

# Penalties

- Penalties for illegal clearing have increased substantially. They have rocketed from \$3000 under the former law to up to \$250000 for an individual
- Brings offence provisions in line with the tougher EP regime. The clearing regime is to be administered and enforced by the Department of the Environment rather than the Soil and Land Commissioner.

# New third party appeal rights

- An appeal may be lodged by the person bound by clearing permit in relation to any requirement within it and to any amendment made to it. That person has 21 days to lodge such an appeal.
- A third party may within 21 days also appeal a requirement in, or amendment to, clearing permit.

# How do these changes rate?

- √ Clearing laws resolve the Palos Verdes issue
- √ Penalties increased for unauthorised clearing of native vegetation
- × Native vegetation excludes intentionally planted vegetation, such as the biodiversity plantings undertaken by Landcare and other greening groups
- × Changes are stapled on to an existing framework in a confusing manner eg why give the Appeals Convenor the powers of an appeal committee and then state that the appeals convenor has certain functions and can convene an appeals panel ?

## Other positive changes: whistleblower protection,

- It is an offence to prejudice the career or safety of someone, to intimidate or harass (or threaten to intimidate or harass) or to take detrimental action against someone for furnishing information and assistance to the CEO for purposes related to the administration of the Act, or for disclosing information that tends to show that another person is involved in an offence under this Act.

# Other positive changes: corporate liability

- If a body corporate commits an offence then each person who is a director or who is concerned in the management of the body corporate is taken to have also committed the same offence.
- Such a person may be proceeded against and convicted that the body corporate has not been proceeded against or convicted

# Further law reform of the EP Act

- Possible issues
- Remove all appeals to the Minister to the SAT
- Make the Object and Principles of the Act binding on all those exercising functions under the EP Act
- Include all native vegetation planted intentionally for biodiversity purposes in the definition so that at least a clearing permit needs to be lodged

# To find out more: websites

[www.environment.wa.gov.au](http://www.environment.wa.gov.au)

- Department of the Environment (also includes Water and Rivers Commission)

[www.wa.gov.au/appeals](http://www.wa.gov.au/appeals)

- The Appeals Convenors website

[www.edo.org.au/edowa](http://www.edo.org.au/edowa)

The Environmental Defender's Office of WA