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Western Australia's Environmental Legislation - A State of Change

Stringent New Laws for Land Clearing

In response to social, economic and environmental pressures, the Western Australian Parliament, in line with the National Strategy for the Protection of Biodiversity and Ecologically Sustainable Development, has developed a new clearing monitoring regime. The *Environmental Protection Amendment Act 2003* ('EPA Act'), came into operation on 19 November 2003. It implements a number of significant reforms to the *Environmental Protection Act 1986* (WA) ('EP Act') which strengthen the regulatory framework governing land clearing practices in WA and support the Federal Government's national objectives of encouraging sustainable agriculture and industry and conserving biodiversity.

The amendments include the introduction of several new offences for causing environmental harm and for clearing native vegetation without a "clearing permit", each carrying significant penalties.

Implications of the new land clearing legislation

The new clearing legislation is a vital part of the Government's plan to provide a more stringent and rigorous regulatory framework within which environmental laws are to be administered. The transfer of responsibility for the majority of clearing applications to the CEO of the Department of Environmental Protection and the development of specific clearing principles, in order to guide the CEO's final decision, effectively strengthen and centralise the Department's enforcement and prosecution mechanisms. The streamlined system of assessment that is likely to result will offer little scope for the Minister for the Environment to weigh up clearing applications against economic and social considerations, which may have previously been relied upon by persons seeking to have an assessment decision reviewed or overturned.

The impact of the new clearing controls, when considered with other key amendments to the EP Act, will be most widely felt amongst corporations and individuals who engage in environmentally sensitive operations. In particular, the impact of these reforms on forestry and farming operations, property development activities and project financing, warrant careful consideration.

Another key legal development in the current reform process is the reverse onus placed on company directors in the event that their corporation commits an offence under the EPA Act. Under the new regime, directors and persons concerned in the management of a corporation will be deemed to be personally liable for any offences attributable to their corporation unless they can prove that they:

- did not know or could not have known that an offence was being committed;
- were not in a position to influence the position of the body corporate in relation to the commission of the offence; and
- used all due diligence to prevent the commission of the offence.

New clearing permit system

The EPA Act repeals the previous clearing scheme contained in the *Soil and Land Conservation Act 1945*. Under the previous scheme, the owner or occupier of land was required to obtain clearing approval from the Commissioner for Soil and Land Conservation to clear more than one hectare of land where a change in the use of the land would result. In contrast, by providing for a general offence of clearing native vegetation without a "clearing permit", the new scheme is not restricted by a specified minimum area of clearing and allows for the assessment of clearing proposals in terms of *all forms* of environmental degradation.

The Definition of Clearing

In the EPA Act "clearing" means:

- (a) the killing or destruction of;
- (b) the removal of;
- (c) the severing or ringbarking of trunks or stems of; or
- (d) the doing of any other substantial damage to,

some or all of the native vegetation in an area.

The definition of “clearing” includes draining or flooding land, burning vegetation, grazing stock or any other activity that kills or damages native vegetation.

What type of clearing will require a permit?

Any clearing of native vegetation anywhere in the State will require a permit unless the clearing is for an exempt purpose. “Exempt” purposes are exceptional circumstances where a clearing permit may not be required. They include clearing:

- if it is necessary for the construction of a lawful building
- to create a boundary firebreak
- within 20 meters of a residence by the landowner
- where other statutory approvals have been granted
- for the purpose of re-growth maintenance
- for the establishment or maintenance of a walking track, access track or fence line

What does the new clearing process involve?

An application for a clearing permit needs to be submitted to the Department of Environmental Protection for all instances of clearing that are not “exempt” categories or for mining and exploration purposes. In deciding whether to approve the clearing proposal, the Department of Environmental Protection will consider the potential effects on biodiversity, water and soil resources, salinity and other pertinent environmental issues in the surrounding area.

What are the penalties for clearing illegally?

The maximum penalty for clearing without a permit is \$500,000 for a body corporate and \$250,000 for an individual. These penalties are significantly higher than those under the previous regime that provided for a maximum penalty of \$3,000 for unlawful clearing.

It is an offence to contravene a condition of a clearing permit. The maximum penalty is \$125,000 for a corporation and \$62,500 for an individual, as well as the potential for the revocation or suspension of the clearing permit.

If “unlawful clearing” is suspected, an “Environmental Protection Notice” may be issued, requiring the recipient to either ensure that no unlawful clearing takes place on the land or to rectify any damage caused by the clearance and to re-vegetate cleared areas. If such actions are not taken, the CEO of the Department of Environmental Protection may order those actions to be taken at the expense of the person bound by the notice. The CEO may apply to the Supreme Court for an injunction to prevent clearing of land.

Environmental Harm

The EPA Act also introduces provisions controlling direct or indirect “environmental harm”. This includes the offences of causing “serious environmental harm” and “material environmental harm”. Environmental harm specifically includes removal or destruction of, or damage to native vegetation or the habitat of native vegetation or indigenous aquatic or terrestrial animals.

Material environmental harm means environmental harm that is not “trivial or negligible” or which results in actual or potential loss, damage or costs of more than \$20,000. The penalties for an offence by a body corporate are \$500,000 (plus a daily penalty of \$100,000) if the material environmental harm is intentional or criminally negligent.

Serious environmental harm means environmental harm that is irreversible, of a high impact or on a wide scale; is significant or in an area of high conservation value or special significance or results in actual or potential loss, damage or costs of more than \$100,000. The penalties for such an offence are double those for material environmental harm.

The EPA Act provides a range of defences to a charge of environmental harm, including where the actions in question were authorised under a works approval, a licence or a clearing approval.

The changes brought by the Act are wide ranging with significantly increased penalties for non-compliance. This newsletter provides only a bare overview of the reforms delivered by the EPA Act.

For comprehensive advice, please contact our Property Development Team.