

Land Clearing Laws in Western Australia

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Abstract

Extensive land clearing has taken place in Australia since the arrival of the European settlers. Australia ranks high in the world in terms of land clearing rates with an estimate of some 687,800 hectares of native vegetation being cleared annually in Australia. The clearing of native vegetation has contributed to a decline in biodiversity and an increase in problems such as salinity and soil erosion. In July 2004 the *Environmental Protection Act 1986 (WA)* was amended to bring in more stringent and uniform controls for clearing native vegetation. The purpose of this article is to provide an overview of the key amendments to land clearing laws and regulations in Western Australia with particular reference to the agricultural sector.

Introduction

Since the settlement of Australia, land clearing has been undertaken on a large scale. United Nations figures place Australia in the top ten land clearing countries, with Australia reportedly ranking sixth in the world in land clearing rates.¹ It is recognised that large-scale land clearing contributes significantly to greenhouse gases, salinity and soil erosion.² The development of agriculture, the backbone of wealth in Australia, necessitated the clearing of land, and agriculture has been the primary reason for land clearing. Whilst land clearing is arguably necessary for agricultural development, the extensiveness of land clearing is also viewed as a major cause of biodiversity loss in Australia. Over many decades land clearing for agricultural purposes has resulted in a significant loss of native vegetation. Bartel³ writes that most of the land cleared in Australia is for agricultural purposes; an enterprise contributing to over 3% of Australia's Gross Domestic Product, and accounting for some 22% of Australia's export earnings. Although comprehensive up-to-date statistical data on land clearing in Australia is not readily available, various studies and reports provide a good indication of the extent of land clearing and its associated environmental impact, over which there is wide consensus. According to the Australian Conservation Foundation, some 687,800 hectares of native vegetation are cleared annually in Australia, and Queensland and New South Wales 'account for more than 80% of the native bush cleared in Australia'.⁴ Tasmania also has a seemingly high rate of land clearance at 17,000 hectares per year, given its size.⁵ According to the Department of Water, Land and Biodiversity Conservation in South Australia, less than 20% of native vegetation remains in South Australia's agricultural areas, and in some places it is less than 10%.⁶ The Australian Bureau of Statistics states that the most intensive agricultural land clearance has occurred in areas where 'crops or sown pasture have been planted'.⁷

Western Australia is a major agricultural region but it is also one of the most biologically diverse areas. The Environmental Protection Authority of Western Australia ('the EPA') notes that 'Western Australia's native vegetation is unique on a world scale' and that 'clearing and consequential salinity have a devastating effect on biodiversity'. The EPA also notes that in agricultural areas 'the removal of

¹ Australian Conservation Foundation, *Australian Land Clearing, A global perspective: latest facts and figures* (2001) <http://www.acfonline.org.au/uploads/res_land_clearing.pdf> at 18 November 2006.

² A. Glanznig, 'Native vegetation clearance, habitat loss and biodiversity decline. An overview of recent native vegetation clearance in Australia and its implications for biodiversity' (Biodiversity Series Paper No. 6., 1995) <<http://www.deh.gov.au/biodiversity/publications/series/paper6/index.html>> at 8 November 2006.

³ R. Bartel, 'Compliance and complicity: an assessment of the success of land clearance legislation in New South Wales' (2003) 20(1) *Environmental Planning and Law Journal* 16-141.

⁴ Above n 1, 2.

⁵ Above n 1, 7.

⁶ Department of Water, Land and Biodiversity Conservation. South Australia <<http://www.dwlbc.sa.gov.au/native/nvsa/index.html>> at 24 March 2007.

⁷ Australian Bureau of Standards <<http://www.abs.gov.au/Ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/1C36C09104A4765ACA256BDC001223FE?opendocument#>> at 23 March 2007.

biodiversity has already been too much'.⁸ In Western Australia, most of the native vegetation clearance has occurred in the south-west region. The Department of Environment and Conservation also claims that 'the south west of Western Australia is known as one of the world's twenty five biodiversity "hotspots" with some of the richest and most *threatened* reservoirs of plant and animal life on earth'; and that in some areas of the State, such as the Avon-Wheatbelt bioregion, 'ninety three percent of native vegetation has already been cleared'.⁹ The loss of vegetation can also have a significant impact on plant and animal species. For example, in Western Australia, Saunders found that a rapid loss of species has occurred in wheat belt reserves since the clearance of vegetation 50 years ago, and in a more recent study 49% of bird species have declined since the region was developed for agriculture.¹⁰ Protecting what remains of the State's native vegetation must, therefore, be a high priority.

Effective laws need to be in place to protect that biodiversity and curtail land clearing. The purpose of this article is to provide an overview of key amendments to land clearing laws and regulations in Western Australia with particular reference to the agricultural sector.

Land clearing legislation and regulation in Western Australia

A mixture of different laws has regulated land clearing in Western Australia, and clearing for agricultural purposes in the South West region. Prior to July 2004, the *Soil and Land Conservation Act 1845* (WA) and the *Environmental Protection Act 1986* (WA) largely controlled land clearing in Western Australia.¹¹ However, the Environmental Defender's Office of Western Australia (EDO) described the land clearing regulation as a 'patchwork quilt of holes' highlighting a number of limitations to the regulations that made it ineffective.¹² In particular, the EDO report noted that the maximum penalty of \$2000 for unauthorised agricultural land clearing was ineffective in deterring land clearing. A further problem was that it was possible for land clearing to take place without penalty during the period in which the EPA assessed the land clearing proposal. In July 2004 amendments to the *EP Act* introduced a number of reforms to provide for stronger and more effective regulations on land clearing. Land clearing is now fully regulated by the *EP Act* and the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* ('the Regulations'), and managed by the Department of Environment and Conservation. Sections of the *Soil and Land Conservation Act 1945* (WA) relating to land clearing were repealed. Some of the key amendments to the legislation are discussed below.

⁸ Environmental Protection Authority. Western Australia 'Environmental Protection of Native Vegetation in Western Australia. Clearing of native vegetation, with particular reference to the agricultural area' (Position Statement No 2, 2000) <http://www.epa.wa.gov.au/docs/1032_PS2.pdf> at 17 November 2006.

⁹ Department of Environment and Conservation, Western Australia, Native Vegetation Protection <http://portal.environment.wa.gov.au/portal/page?_pageid=53,34373&_dad=portal&_schema=PORTAL> at 23 March 2007.

¹⁰ Above n 9.

¹¹ Other legislation such as the *Wildlife Conservation Act 1950* (WA) and the *Town Planning and Development Act 1928* (WA) also dealt with matters concerning the clearing of vegetation.

¹² Environmental Defender's Office WA (Inc), 'Regulation of land clearing: reforming the law in Western Australia' <http://www.edowa.org.au/archives/11_Regulating_land_clearing.pdf> at 17 November 2006.

The purpose of the *EP Act* is to provide for ‘the prevention, control and abatement of pollution and environmental harm, for the conservation, preservation, protection, enhancement and management of the environment’. The protection, conservation and management of native vegetation are, therefore, a primary goal of the *EP Act*. Division 2 of the Act deals with the clearing of native vegetation. The basic principles guiding the clearing of native vegetation are set out in Schedule 5; and Schedule 6 sets out the exemptions that are generally applied to land clearing that are authorized under a separate statute.

What is protected?

Clearing native vegetation is prohibited unless a permit is obtained or it is for an exempt purpose. This applies to all land in Western Australia including rural land, pastoral leases and roadside verges. The law applies only to *native vegetation*, which is defined to mean any indigenous vegetation, living or dead, and terrestrial or aquatic.¹³ Clearing is defined as any act that kills, destroys, removes or substantially damages some or all of the native vegetation in an area.¹⁴ It is an offence for a person to clear land of native vegetation without a permit or if the clearing is not for an exempt purpose.¹⁵

Clearing permits

Under the *EP Act* land clearing is controlled by a permit system, which applies to private and public land.¹⁶ A permit authorises a person to clear land, which may be subject to certain conditions and restrictions.¹⁷ The *EP Act* provides for two types of permits, namely an *area* permit and a *purpose* permit.¹⁸ An area permit applies to the clearing of a specified area, for example, clearing a specific area for agricultural purposes.¹⁹ A purpose permit relates to the clearing of different areas from time to time for a purpose that is stated in the permit application, for example, for the purpose of local governments carrying out road works.²⁰ The duration of the permit is limited: an area permit continues for 2 years and a purpose permit for 5 years from the date the permit was granted, unless another date is specified on the permit.²¹ The application process and requirements for a permit appear substantial. Applications require detailed information about the land clearing activity and supporting information such as photographs and maps. The application must also be advertised in a State newspaper for public comment. Applications and current

¹³ Section 51A and 3(1). It does not include vegetation in a plantation.

¹⁴ Section 51A.

¹⁵ Section 51C.

¹⁶ Clearing means the destruction or removal of native vegetation, the severing or ringbarking of trunks or stem or doing any other substantial damage to native vegetation (section 51A).

¹⁷ Sections 51H and 51I.

¹⁸ Section 51E.

¹⁹ Section 51E(b)(i).

²⁰ Section 51E(b)(ii).

²¹ Section 51G.

clearing permits are listed on the Department of Environment and Conservation's website.²² The application process allows members of the public to make comments on the applications and lodge objections.

Exempt clearing

A potential weakness of the legislation and amendments is the extent of the exemptions that apply to clearing native vegetation and for which a permit is not required. A lengthy list of exemptions is set out in Schedule 6 of the *EP Act*. The type of exemptions mainly relate to land clearing activities that are regulated and authorised under another statute, for example, clearing that is done in accordance with a licence or approval under the *Conservation and Land Management Act 1984* (WA),²³ the *Wildlife Conservation Act 1950* (WA)²⁴ or the *Town Planning and Development Act 1928* (WA).²⁵ Clearing that is caused by the grazing of stock on land under a pastoral lease within the meaning of the *Land Administration Act 1997* (WA) is also exempt.²⁶ Similarly, clearing that is permitted under the *Bush Fires Act 1954* (WA) is exempt. For example, clearing for burning during a restricted time and during a prohibited time to protect buildings, haystacks and crops is permitted; provided a permit is obtained from a fire control officer.²⁷

Further exemptions are provided for in Regulation 5, which sets out clearing for a prescribed purpose under section 51 of the *EP Act*. These exemptions generally refer to day-to-day activities that are meant to have a low impact on the environment. However, unlike the Schedule 6 exemptions, the exemptions under Regulation 5 do not apply in areas that are identified as 'environmentally sensitive areas'.²⁸ These areas have vegetation with a high conservation value and, therefore, cannot be cleared. The exemptions can be separated into 'one year per hectare exemptions' and 'other exemptions'. The former types of clearing may not exceed one hectare in a financial year. The types of activities excluded under this Regulation and which fall within the one hectare restriction include: clearing to construct a building or structure,²⁹ such as a shed; clearing to allow for fencing materials and new fence lines,³⁰ and vehicle and walking tracks – which must not be wider than necessary and does not include riparian vegetation, that is, vegetation associated with a wetland or watercourse;³¹ and clearing for firewood and timber for farm and domestic use.³² Vegetation cleared for firewood and timber, however, can only be used for the owner's personal use and cannot be commercialised.

²² Department of Environment and Conservation, Western Australia, <http://portal.environment.wa.gov.au/portal/page?_pageid=53,1254654&_dad=portal&_schema=PORTAL at> at 12 July 2007.

²³ Schedule 6(3).

²⁴ Schedule 6(6).

²⁵ Schedule 6(9).

²⁶ Schedule 6(13).

²⁷ Schedule 6(1).

²⁸ An area that is the subject of a declaration that is in force under section 51B *EP Act*.

²⁹ Reg 5 item 1.

³⁰ Reg 5 items 6, 10, 11.

³¹ Reg 5 items 12, 13.

³² Reg 5 item 5.

Clearing exemptions that are not subject to the one hectare restriction include: clearing for the purpose of preventing ‘imminent danger’ to human life;³³ clearing for fire hazard reduction;³⁴ clearance in accordance with a code of practice;³⁵ the maintenance of existing cleared area around infrastructure – provided the clearing of the area was legally done within the previous 10 years;³⁶ and clearing to maintain existing cleared areas for pasture, cultivation or forestry – provided the land was lawfully cleared within the 10 years prior to clearing and has been used for these purposes within those 10 years.³⁷ Clearing may be exempt if it is done in accordance with a code of practice that is issued by the CEO of the Department of Environment and Conservation under section 122A of the *EP Act*.³⁸

Assessing permit applications

The CEO of the Department of Environment and Conservation assesses applications for permits. Assessment is based on a number of factors and impacts on the environment. The CEO must take the following aspects into account: comments received by parties who have been invited to make comments on the application; any relevant town planning scheme; State planning policies (e.g. *State Environmental (Cockburn Sound) Policy 2005*); a local planning strategy; the land clearing principles in Schedule 5 of the *EP Act*; and any other matter that the CEO considers relevant.³⁹ The CEO must also ensure that the application is consistent with any approved policy and may not amend or grant a permit if the effect on the environment would be inconsistent with any approved policy. For example, Environmental Protection Policies established under Part III of the *EPA Act* are ‘an approved policy’.⁴⁰

Schedule 5 of the *EP Act* lists a number of principles that should guide decision-making for clearing native vegetation. According to this Schedule, native vegetation should not be cleared if:

- it comprises a high level of biological diversity;
- it is necessary for the maintenance of a significant habitat for indigenous fauna in Western Australia, rare fauna declared under the *Wildlife Conservation Act of 1950* (WA) or a threatened ecological community, designated as such under the *Commonwealth Environmental Protection and Biodiversity Act 1999*;⁴¹
- it is significant as a remnant of native vegetation in an area that has been extensively cleared;
- it is associated with a watercourse or wetland;

³³ Reg 5 item 2.

³⁴ Reg 5 item 3.

³⁵ Reg 5 item 4.

³⁶ Reg 5 item 15.

³⁷ Reg 5 item 14.

³⁸ Reg 5 item 4.

³⁹ Section 51O.

⁴⁰ Section 51P.

⁴¹ Schedule 5(2).

- the clearing is likely to cause considerable land degradation;
- the clearing is likely to cause deterioration in the quality of surface or ground water;
- the clearing is likely to cause or exacerbate the incidence of flooding; or
- the clearing is likely to impact on environmental values of any adjacent or nearby conservation area, for example, a marine nature reserve or national park.

In addition to these principles, the precautionary principle should also be taken into account when making a decision about a clearing permit. Section 4A sets out the environmental principles underpinning the *EP Act*. The precautionary principle requires that ‘if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation’.⁴² In the application of the precautionary principle, decisions should be guided by careful evaluation to avoid serious or irreversible damage and an assessment of risk-weighted consequences of various options.⁴³ The trigger for the application of the precautionary principle is a threat of serious or irreversible environmental damage, and such a threat will depend on scientific evaluation. The second aspect of the precautionary principle is based on the premise that where ‘uncertainty or ignorance exists concerning the nature or scope of environmental harm, decision-makers should be cautious’.⁴⁴ Similar provisions can be found in other jurisdictions.⁴⁵

The CEO of the Department of Environment and Conservation can grant or refuse an application, or grant an application subject to certain conditions. A condition may specify activities that are authorised or not authorised by the clearing permit.⁴⁶ Section 51I lists things that the holders of a clearing permit can be required to do. This section provides a potentially strong mechanism for ensuring that permits are used in a responsible and accountable manner. The contravention of clearing permit conditions amounts to an offence.⁴⁷ The maximum penalty for contravening a convention is \$62,000 for an individual and \$125,000 for a corporation, which may not be sufficient penalties to deter contraventions.⁴⁸ Conditions that may be imposed include:

- taking steps to prevent or minimise the likelihood of environmental harm;
- establishing and maintaining vegetation on land to offset the loss of the cleared vegetation;
- making monetary contributions to a fund for the purpose of establishing or maintaining vegetation;

⁴² *EP Act*, section 4A(1). Also, *EPBC Act* s 3A(b).

⁴³ *EP Act*, section 4A. The term ‘risk-weighted consequences’ has been described as ‘an attempt to undertake semi-quantitative analysis, and determine the likelihood of irreparable damage or an undesired or adverse outcome arising from a particular development activity.’ See G. Bates, *Environmental Law in Australia* (6th Ed, 2006) 129.

⁴⁴ *Leatch v Director General of National Parks and Wildlife Services* (1993) 81 LGERA 270 at 282.

⁴⁵ Section 3(2)(d) of the *Vegetation Management Act 1999* (QLD) specifically provides for the application of the precautionary principle in relation to clearing native vegetation.

⁴⁶ Section 51I.

⁴⁷ Section 51J.

⁴⁸ Schedule 1, *EP Act 1986*.

- monitoring operations and environmental harm;
- conducting environmental risk assessment studies;
- providing reports on audits and studies; or
- adhering to environmental management systems.

Appeals

Appeals against a decision to grant or refuse an application are made to the Minister for Environment.⁴⁹ The applicant may lodge an appeal against the refusal to grant an application or against conditions attached to the permit. An applicant has 28 days from notification to lodge the appeal in writing setting out the grounds of the appeal.⁵⁰ Third parties are also entitled to appeal. A person other than the applicant or permit holder may lodge a written appeal within 28 days against a decision to refuse a permit,⁵¹ or within 21 days if the person disagrees with the granting of a permit.⁵²

Clearing offences and penalties

If a person or body corporate clears native vegetation without obtaining a permit and the clearing is not for an exempt purpose, penalties may be applied. The amendments to the *EP Act* have increased the penalties considerably, which will hopefully serve as a deterrent. The maximum penalty for unlawful clearing under section 51C is \$250,000 for individuals, and \$500,000 for a body corporate.⁵³

Offence of environmental harm

The amendments to the *EP Act* introduced a new offence of environmental harm, with new penalties. A person who causes serious or material environmental harm, or intentionally or with criminal negligence causes serious⁵⁴ or material⁵⁵ environmental harm, commits an offence. Serious environmental harm is defined as harm that is irreversible, of a high impact or is on a wide scale; is significant or in an area of high conservation value; or of special significance; or results in actual or potential damage. Material environmental harm is defined as harm that is neither trivial nor negligible; or results in actual or potential damage.⁵⁶

If it can be established that the environmental harm occurred as a result of land clearing, a penalty can be imposed, and in some cases imprisonment, or both. The maximum penalty for an individual who causes serious environmental harm is \$250,000 or 3 years imprisonment or both, and the penalty for material environmental harm is \$125,000. If serious harm was caused with intentional or criminal negligence, the

⁴⁹ Section 101A.

⁵⁰ Section 101A(1).

⁵¹ Section 101A(3).

⁵² Section 101A(4).

⁵³ Schedule 1, *EP Act 1986*.

⁵⁴ Section 50A.

⁵⁵ Section 50B.

⁵⁶ Section 3A(2).

penalty is \$500,000 or 5 years imprisonment or both. If an individual causes material environmental harm with intentional or criminal negligence the penalty is \$250,000 or 3 years imprisonment. The maximum penalty for a body corporate that causes serious environmental harm is \$500,000 and for material environmental harm it is \$250,000. If body corporate causes serious harm with intentional or criminal negligence, the penalty is \$1 million; and if it is material environmental harm with intentional or criminal negligence the penalty is \$500,000.⁵⁷

Monitoring and enforcement

The *EP Act* makes provision for various enforcement mechanisms. The CEO may revoke or suspend a clearing permit if the CEO is satisfied that there has been a breach of any condition attached to the permit.⁵⁸

The CEO can issue a 'vegetation conservation notice' if there are reasonable grounds to suspect that unlawful clearing is likely to take place or is taking place.⁵⁹ The vegetation conservation notice may require a person to do one or more of the following: protect existing vegetation; repair any damage; prevent erosion; re-establish and maintain vegetation on an area that has been cleared; or ensure that specified land, watercourses or wetlands are not damaged or detrimentally affected.⁶⁰ A notice may be given to the owner or occupier of the land, or any other person if the CEO determines that it is practical for such a person to comply with and implement the notice.⁶¹ Before issuing a notice the CEO must invite the person to give a written submission as to why a notice should not be issued.⁶² A notice may be registered on a certificate of title and bind future owners of the land.

The CEO can also apply to the Supreme Court for a clearing injunction to prevent a person from engaging in 'improper conduct', namely any act or omission constituting a contravention.⁶³ The Supreme Court may grant an injunction if it is satisfied that it is appropriate to do so, whether or not it is proved that the person intends to engage in, or continue to engage in, improper conduct; or whether or not the person has previously engaged in improper conduct.⁶⁴

Some issues regarding implementation

The amendments to the *EP Act* that aim to protect, control, reduce and monitor native vegetation clearing are still fairly new and it may be some time before the effects are seen. The amendments provide a unified

⁵⁷ Schedule 1, *EP Act 1986*.

⁵⁸ Section 51L.

⁵⁹ Section 70. Unlawful clearing is clearing that contravenes section 51C or 51J.

⁶⁰ Section 70(4)(b).

⁶¹ Section 70(3).

⁶² Section 70(5).

⁶³ Section 51S.

⁶⁴ Section 51S(4).

regulatory framework and perhaps the most important aspects are the increase in penalties and higher penalties for environmental harm. However, as Bartel states ‘a law does not necessarily translate into practice’;⁶⁵ there is no guarantee that the law will be successful. In assessing the adequacy or success of the legislation, a number of approaches may be adopted. In the first instance, the legislation may be evaluated in terms of its objectives and measurable outcomes in terms of its success in protecting native vegetation, reducing clearing and reducing the loss of biodiversity.⁶⁶ However, reliable data of this nature does not appear to exist and would require extensive research. Environmental studies on native vegetation over a period of time may eventually provide insights into the impact of the legislation on native vegetation protection. Bartel suggests that a test to see whether rates of vegetation loss have been reduced is near impossible for most States.⁶⁷ Another means of evaluating the impact of the legislation is to examine data on the number of permits granted, the number refused, and the number of convictions for unlawful clearing.

Legal land clearance

The *EP Act* is aimed at protecting biodiversity and reducing land clearing. However, the Act still provides for extensive legal land clearing. Bartel⁶⁸ argues that legislation may still be unsuccessful in achieving its aims if the total amount of legal clearance is still great. Since the amendments to the *EP Act* came into operation in July 2004, a number of clearing permits have been approved and the number approved far exceeds the number declined. Some 1197 applications for a clearing have been received of which 93 were declined, 53 refused and 553 approved. In terms of permits for agricultural purposes, 254 applications have been received, 27 were withdrawn, 17 declined (not considered), 42 refused and 96 granted.⁶⁹ The Auditor General’s report on land clearing notes that for the period 2005 to 2007, most clearing was related to mining and petroleum activities (66%) and only 15% of approved clearing was for agricultural purposes.⁷⁰ Although it is arguable that the application and assessment process for clearing permits is rigorous and the permits allow clearing that is necessary and which is likely to have a low environmental impact, the extent of legal land clearance may still be too high to stem the tide of native vegetation clearing. However, further research and quantitative data is needed in order to assess the effect of the legislation and whether it will achieve its objective of protecting and maintaining native vegetation. According to the State of Environment Report 2007 ‘comprehensive statistics on the rate of clearing of native vegetation are difficult to obtain and there are major challenges in accurately representing the data’ and ‘there is a need for a

⁶⁵ Bartel, above n 3, 121.

⁶⁶ Unlike legislation in other jurisdictions, the *EP Act* does not specify objectives directly in relation to clearing native vegetation.

⁶⁷ Bartel, above n 3, 124.

⁶⁸ Bartel, above n 3, 135.

⁶⁹ Department of Environment and Conservation. Personal Communication. It is, however, noted that most clearing is related to mining and petroleum activities (66%) and only 15% of approved clearing was for agricultural purposes.

⁷⁰ Auditor General for Western Australia, ‘Management of Native Vegetation Clearing’ (Report 8, September 2007) <http://www.audit.wa.gov.au/reports/report2007_08.pdf> at 15 October 2007.

consolidated and accurate record of the total amount of native vegetation being cleared in WA every year'.⁷¹

Too many exemptions?

The legislative framework for protecting native vegetation is intended to stem the flow of clearing and to regulate clearing through the permit system. However, the exemptions provided for under Schedule 6 and Regulation 5 are extensive and may reach too far in allowing for the clearing of native vegetation.⁷² The fact that prescribed activities are 'exemptions' means that they are clearing activities that can be carried out without applying for a permit. This relies on self-regulation and self-assessment. This could result in clearing where landowners believe the clearing falls within an exemption. This raises the concern about what onus or duty is placed on landowners to check the exemptions. Although there are no reported cases in Western Australia regarding unlawful land clearing, the problem of self-regulation and assessment is illustrated in a South Australian case *Native Vegetation Council v Wandel*.⁷³ In this case the defendant cleared 59 native trees and built an earthen wall across a creek that resulted in the flooding of 22.5 hectares of native vegetation, almost all of which died as a result. The defendant claimed that he believed that cutting trees for firewood and to clear a vehicular track; and to build a dam wall all fell within the exemptions. These activities did not; and although the defendant was issued with orders to reduce the dam size and replace native vegetation, the extensive damage had been done and it was doubtful that the defendant would have the financial resources to carry out the necessary re-vegetation.

Compliance and enforcement

Monitoring compliance with the legislation and permits may prove challenging.⁷⁴ Western Australia is the largest state in Australia (2 525 500 square kilometres in area) with vast areas under agriculture. Ongoing monitoring is essential to identify unlawful clearing and breaches of permits and conditions. Without the necessary resources, monitoring is unlikely to be adequate; relying instead on the public to report clearing offences. Without adequate monitoring, offences will go unreported and convictions will be difficult to obtain. Inadequate compliance, monitoring and enforcement undermine the value of the legislation. According to the State of Environment Report 2007 'unauthorised (illegal) clearing continues to occur, although the scale of this problem remains unknown'.⁷⁵ Similarly the Auditor General's report on land clearing in Western Australia also notes that since the introduction of the land clearing regulations in 2004,

⁷¹ Government of Western Australia, 'State of Environment Report 2007' <<http://www.soe.wa.gov.au/>> at 15 October 2007.

⁷² Amendments to the regulations in 2007 now allow clearing without a permit for all mineral and petroleum exploration work that is not in an 'Environmentally Sensitive Area'. *Environmental Protection (Clearing of Native Vegetation) Amendment Regulations 2007 (Clearing Amendment Regulations)* that commenced on 30 March 2007.

⁷³ [2006] SAERDC 17.

⁷⁴ Compliance inspections are carried out by inspectors from the Department of Environment and Conservation. Inspectors have the power to monitor compliance with the *EP Act* and audit the clearing of native vegetation under the clearing permit.

⁷⁵ Above n 71.

'there has been no meaningful test to see if decisions are being complied with'.⁷⁶ According to this report the Department of Environment and Conservation has received more than 550 complaints of illegal clearing in general; more than half have not been resolved and only two prosecutions have been made.⁷⁷

Judicial decisions

The maximum penalty for a contravention by an individual is \$500,000 and a body corporate is \$1 million. High penalties are needed to deter unlawful clearing. However, how likely is it that courts will impose maximum penalties? Decisions of the courts can serve to strengthen compliance or undermine the legislation. The new regulations under the *EP Act* are yet to be tested in this regard in Western Australia, however, it has been observed in other jurisdictions that several judicial decisions have shown a very lenient approach to convictions; seldom, if ever, are maximum penalties imposed. Bartel⁷⁸ analyses a number of cases involving unlawful clearing in agricultural areas, where the combined fines were less than the maximum penalty for a single infringement. As an example, in the case of *Department of Land and Water Conservation v Orlando Farms Pty Ltd* (1998) 99 LGERA 101 the defendant, who had unlawfully cleared 1,200 hectares for dryland wheatcropping, was fined a mere \$35,000; even though Lloyd J found that the clearance had caused significant environmental harm because the vegetation cleared was regionally reduced and had provided a habitat to at least one threatened species. One trend to emerge is that offenders can considerably reduce their fines by simply co-operating with officials, being very remorseful and contrite, and pleading guilty early on in the proceedings. For example, in the New South Wales case of *Director-General Department of Land and Water Conservation v Ranke* [1999] NSWLEC 22, the defendant's shame and good character 'served to virtually absolve the offender'; with Talbot J stating 'that judicial opprobrium would be reserved for irresponsible actions'.⁷⁹ Kehoe also cites an example of a high profile case in Queensland that demonstrates the court's tendency to leniency. A prominent cattle farmer, and member of a company that owns more than one million hectares in central Queensland, unlawfully cleared 11,830 hectares of land. The defendant pleaded guilty and was fined a \$100,000; and no conviction was recorded and no costs were awarded. It appears that the reasoning behind the court's leniency as to costs was that the defendant pleaded guilty and was co-operative.⁸⁰ If Western Australia adopts a similar approach and exercises such leniency, it will do little to deter offenders from unlawfully clearing native vegetation. Robust judicial decisions will be required to ensure appropriate penalties are applied and maximum penalties are not shied away from.

Compensation

The clearing regulations of Western Australia apply to private and public land. Therefore, they serve as a restriction on private property rights, which could create tensions between freehold landowners and

⁷⁶ Above n 70, 4.

⁷⁷ Above n 70, 17. It is not stated what, if any, of these are related to the agricultural sector.

⁷⁸ Bartel, above n 3, 127.

⁷⁹ Bartel, above n 3, 129.

⁸⁰ J. Kehoe, 'Land clearing in Queensland' (2006) 23 *Environmental Planning and Law Journal* 148-157.

government bodies. Kehoe⁸¹ argues that ‘the imposition of any right is problematic; but the absolute restriction, especially of rights of land use, has the potential to unleash boundless opposition and resentment’. In Queensland, for instance, Kehoe states that Property Rights Australia has indicated that they may challenge the validity of the *Vegetation Management Act 1999* (Qld) in court because of concern about the interference in their land rights.⁸² In Western Australia many of the farming areas are under pastoral lease. A pastoral lease, issued under the *Land Administration Act 1997* (WA), authorises a person to use crown land for the grazing of stock. A lease provides limited property rights and a clearing permit is still required for the clearing of native vegetation.

The restriction of land rights raises the question of whether compensation or financial assistance schemes should be available to provide incentives for farmers to protect native vegetation and reduce clearing. For example, the New South Wales government has developed a Native Vegetation Assistance Package to help farmers who experience financial hardship as a result of the *Native Vegetation Act 2000* (NSW) that effectively put an end to broad scale land clearing. The package is worth up to \$37 million and is funded by the Environmental Trust. To be eligible for assistance, farmers must have been refused consent to clear native remnant vegetation and demonstrate financial loss.⁸³ Similarly in Queensland, the State government is providing \$150 million over five years to assist landowners affected by land clearing legislation. The Vegetation Incentives Program worth \$12 million is to support landholders who maintain and manage native vegetation on their land. An \$8 million Best Management Practice Program was also available to provide financial support to landholders to improve land management practices.⁸⁴ It is possible that such financial incentives may have a positive impact on farm practices and encouraging farmers to maintain native vegetation. In a survey of farmers’ attitudes to native vegetation carried out in the wheatbelt of Western Australia in 1996, many (77%) farmers indicated that better financial support would encourage farmers to replant more local vegetation and 73% indicated that financial compensation for time and materials would be an incentive to farmers to better manage and protect bushland. The participants also indicated that the introduction of greater tax incentives for land care works was the best method of providing financial support.⁸⁵ Some financial incentive is available through the use of conservation covenants.

Conservation covenants

⁸¹ Above n 80, 157.

⁸² Above n 80, 154.

⁸³ New South Wales Government, *Native Vegetation Management in NSW* <http://www.nativevegetation.nsw.gov.au/fs/fs_16.shtml> at 3 April 2007.

⁸⁴ Queensland Government, *Natural Resources and Water* <<http://www.nrw.qld.gov.au/vegetation/financial/agforward.html>> at 3 April 2007.

⁸⁵ S. Jenkins, *Native vegetation on farms survey 1996. A survey of farmers’ attitudes to native vegetation and landcare in the wheatbelt of Western Australia* (1996) (Research Report 3/98, Agriculture Western Australia and Department of Conservation and Land Management) <<http://www.environment.gov.au/land/publications/nativeveg/index.html>> at 23 March 2007.

Conservation covenants provide one means by which landowners can be encouraged to protect and manage native vegetation on their property. A conservation covenant is a voluntary agreement between the landowner and another party, which is noted on the land title. A conservation covenant that provides for the protection and management of native vegetation may be a positive covenant, which requires the landowner to take positive steps to protect native vegetation, or a restrictive covenant, which restricts the person's use of the land. Statutory conservation covenants are agreements between landowners and a statutory body such as the Department of Environment and Conservation. For example, under Part IVA section 30 of the *Soil and Land Conservation Act 1945* (WA) a landowner may enter into a conservation covenant with the Commissioner of Soil and Land Conservation. Conservation covenants under section 30 may be specified for a period of time or in perpetuity, and are irrevocable. They also bind their successor in title. A conservation covenant under section 30 can be used for the protection of native vegetation. Conservation covenants can also be entered into with the Department of Environment and Conservation under the covenant program. There are various incentives available to landowners who voluntarily enter into a covenant. Ongoing conservation advice is available to landowners to assist them in their conservation efforts, up to \$500 is made available for the landowner to seek independent legal advice at the time of entering into the covenant, some funding is available for fencing or other management, and landowners may get rate reductions. Tax concessions are also available to landowners entering into perpetual conservation covenants.⁸⁶ The main financial incentive is through tax concessions available under the *Income Tax Assessment Act 1997* (Cth)⁸⁷ and land tax exemptions under the *Land Tax Assessment Act 2002* (Cth).⁸⁸

Conclusion

In July 2004 amendments to the *Environmental Protection Act 1986* came into force that prohibited the clearing of native vegetation across Western Australia. The clearing of native vegetation is unlawful unless a clearing permit has been granted or the clearing falls within the exemptions under Schedule 6 or Regulation 5. A primary aim of the legislation and regulations is to protect and manage native vegetation, and to reduce clearing. The amendments brought about some significant changes, in particular, the increase in penalties for unauthorised clearing. The Department of Environment and Conservation (formerly the Department of Environment) has indicated that the changes to the legislation are necessary for protecting the remaining vegetation and sustainable land use. The Department notes that the loss of native vegetation and unsustainable agricultural practices has led to a serious decline in fauna and flora and has contributed to salinity. However, it remains to be seen whether the legislative controls will in fact bring about a

⁸⁶ Department of Environment and Conservation, *Nature Conservation Covenant Program* <<http://www.naturebase.net/content/view/120/453/>> at 24 April 2007.

⁸⁷ Section 31.5 provides for an income tax deduction for conservation covenants provided certain conditions are met, including the requirement that the conservation covenant is perpetual.

⁸⁸ Section 41 provides that land that is used solely or principally for the conservation of native vegetation is exempt for an assessment year if the land is the subject of a conservation covenant that was in force at midnight on 30 June in the financial year before the assessment year.

significant reduction in the clearing of native vegetation, especially in agricultural areas, and reduce the impact on biodiversity.