Environmental Defenders Office

NATIVE VEGETATION ISSUES PAPER

SUBMISSIONS

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BACKGROUND

The Department of Water and Environmental Regulation (**DWER**) is currently seeking feedback on the "Native Vegetation in Western Australia- Issues Paper" (**Native Vegetation Issues Paper**) published on 15 November 2019. It seeks stakeholder advice and feedback on four initiatives that aim to improve the consistency and transparency in how the state's native vegetation is managed including:

1. A State native vegetation policy
2. Investing in better information including mapping and monitoring
3. Improving our regulatory processes
4. Exploring a bioregional approach to managing native vegetation

The Environmental Defenders Office (**EDO**) is a community legal service that uses the law to protect and defend Australia's wildlife, people and places. Our submissions will therefore focus on the third initiative of the Native Vegetation Issues Paper – improving the regulation of native vegetation in WA. We note that the Conservation Council of Western Australia has prepared comprehensive submissions in relation to the State native vegetation policy and we endorse their submissions in that respect.

ISSUES WITH CURRENT REGULATION

A substantial amount of land continues to be cleared in WA, without adequate processes for reporting or monitoring the state and condition of native vegetation. The Native Vegetation Issues Paper acknowledges this, stating:

> *"In some local government areas, more than 93 per cent of the original vegetation is lost (DBCA 2018), including clearing of up to 97 per cent of some woodland areas (Bradshaw 2012). This situation has led to the State's Environmental Protection Authority identifying clearing and degradation of native vegetation as a key threat to Western Australia's biodiversity (e.g. EPA 2017)."*[1]

This demonstrates the inadequacies of the current regulation of clearing in WA, with the EPA stating in its 2017 Annual Report:

> *"Approval of vegetation clearing in WA currently takes place in a complex regulatory environment, and there is a disconnection between individual clearing decisions and the information used for large-scale conservation planning, monitoring and assessment of cumulative impacts."*[2]

Some particular issues with the current regulatory processes that need to be addressed through substantial reforms are discussed in detail below.

[1] Native Vegetation Issues Paper, 2.
[2] EPA Annual Report 2017, p24.

Reactive Regulatory Approach

The regulation of clearing in WA adopts a reactive rather than proactive approach to the protection of native vegetation. Instruments that intend to protect habitat and biodiversity generally react to harmful actions such as clearing (for example by restoring and rehabilitating land) rather than proactively protecting native vegetation through avoidance and minimisation measures. Regulatory reforms are therefore required in WA to ensure that a proactive approach to the protection of native vegetation is adopted for example by striving to achieve net environmental improvements/benefits through offsets and allowing condition precedents to be imposed in clearing permits.

Piecemeal, Fragmented and Uncoordinated Regulation

Clearing of native vegetation in WA is governed in a piecemeal, fragmented and uncoordinated fashion. Clearing is regulated by numerous agencies including DWER and the Department of Mines, Industry Regulation and Safety (**DMIRS**) under multiple pieces of legislation including the *Environmental Protection Act 1986* (WA) (**EP Act**) and associated *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (**Clearing Regulations**), *Biodiversity Conservation Act 2016* (WA) (**BC Act**), *Conservation and Land Management Act 1984* (WA) (**CALM Act**), *Land Administration Act 1997* (WA) (**LA Act**) and *Soil and Land Conservation Act 1945* (WA) depending on the development proposed. The Native Vegetation Issues Paper recognises this, stating that "More than 10 government departments and authorities play a role in managing activities that affect native vegetation, applying 16 Acts which have widely varying primary goals".[3]

There is a lack of coordination between these agencies and pieces of legislation, creating a risk of regulatory capture and inconsistency in approach. It also prevents a strategic approach being taken to the protection of native vegetation in WA. Further, in some circumstances the responsibility of assessing and approving of clearing of native vegetation under Part V of the EP Act is delegated to other non-environmental agencies with the responsibility to promote development and resource extraction rather than to protect environment, resulting in inconsistent environmental standards being applied.

Clearing provisions are also not well integrated with provisions in the same or different legislation. For example, the provisions of Part V of the EP Act relating to clearing are not well integrated with the provisions in Part IV relating to environmental impact assessment of proposals. Further, due to a lack of integration and coordination between provisions of the EP Act and the *Planning and Development Act 2005* (WA), the potential exists for a significant amount of clearing to occur under planning schemes that is not regulated or conditioned through the clearing or environmental impact assessment processes.

Excessive Discretion Provided to Proponents and Decision-Makers

Clearing provisions provide substantial discretion to proponents in deciding whether clearing requires a clearing permit. Very broad discretionary powers are also provided to decision-makers such as DWER in assessing clearing permit applications and making decisions in relation to clearing, with clearing provisions being broadly drafted and there being no regulations applying to the way clearing decisions should be made.

[3] Native Vegetation Issues Paper, 6.

Limited Enforcement Capability

Public participation in the regulatory processes applying to clearing in the EP Act and other legislation is currently limited to public comment and appeals processes for clearing applications. There are no opportunities for third parties to enforce the clearing provisions in the EP Act, meaning the burden falls entirely on government.

NATIVE VEGETATION ISSUES PAPER

The Native Vegetation Issues Paper includes better regulation and improving WA's regulatory process as a key initiative for improving vegetation management. It states that continuous improvement in clearing regulation is underway, focusing first on improving operational systems, processes and policy for clearing approved through clearing permits. The desired outcome for this initiative is clear objectives and consistent standards across all regulatory processes affecting native vegetation condition and extent. EDO supports this initiative.

The key elements of "better regulation" that consultation is sought on include:

- Improved protection for native vegetation
- Ensuring development is sustainable
- Streamlined regulation for cost saving
- Improved assessment timeframes
- Transparent, evidence-based decisions
- Improved compliance and enforcement of unauthorised clearing

IMPROVED PROTECTION FOR NATIVE VEGETATION

Given the substantial issues associated with the current regulation of clearing in WA, major regulatory reforms are required to improve the protection of native vegetation. Better regulation of clearing presents various opportunities, including:

- Protecting native vegetation and habitat from degradation and biodiversity loss
- Protecting species, ecological communities and processes
- Reducing greenhouse gas emissions

Introduction of Native Vegetation Legislation

A purpose-specific native vegetation Act could be introduced in WA to conserve, protect and enhance native vegetation and regulate the clearing of native vegetation, as has been done in comparable jurisdictions. For example, Queensland has a specific *Vegetation Management Act 1999* (NSW) and South Australia has a *Native Vegetation Act 1991* (SA).

A WA native vegetation Act could contain modern provisions and its objectives that promote enhancement of WA's biodiversity rather than merely regulating its decline. It could help to overcome issues with the piecemeal, fragmented and uncoordinated regulation of clearing in WA by providing a 'one-stop-shop' for clearing regulation. The proposed native vegetation policy could be given statutory force under such legislation.

In the absence of the introduction of native vegetation legislation in WA, substantial review and reform of the provisions of current legislation regulating clearing is required. In our submissions we focus on required reforms to the EP Act and the BC Act. However, we note that development of a new State native vegetation policy in WA will require the review and amendment of the full suite of legislation that regulates biodiversity conservation and land management in WA to ensure they are consistent with the new policy.

RECOMMENDATION 1: Introduction of a dedicated native vegetation Act in WA.

Review of the Environmental Protection Act 1986 (WA)

The EP Act is currently under review with the Exposure Draft Bill (**draft bill**) and the 'Modernising the *Environmental Protection Act* Discussion Paper' (**discussion paper**) being published on 28 October 2019. EDO made submissions on these documents on 28 January 2020.

Given many of the reforms required to improve the regulation of clearing of native vegetation relate to the EP Act as the primary legislation regulating clearing in WA, we highlighted key areas for reform in this area in Appendix A of our submission on the EP Act. However, we emphasised that the proposed amendments of clearing provisions should informed by, and not occur before the completion of, the consultation process on the Native Vegetation Issues Paper, and the subsequent policy formulation process.

The discussion paper states that the draft bill "simplifies and improves the provisions for clearing of native vegetation by focusing on environmental outcomes rather than administrative processes". In particular, the draft bill provides for environmentally sensitive areas (**ESAs**) to be prescribed in regulations, introduces a new referral process to allow the CEO of DWER to decide whether a clearing permit is required, and proposes changes to allow the use of remotely sensed images as prima facie evidence of vegetation on land and its condition.

Declaration of environmentally sensitive areas

The draft bill proposes the declaration of ESAs in regulations rather than in notices declared by the Minister. The discussion paper states that this amendment will ensure ESAs remain current and relevant, that there is an efficient and effective process for prescribing ESAs and that they are subject to a transparent process. EDO does not oppose this amendment.

Referral of proposed clearing to CEO

The draft bill proposes to introduce a new referral process in Section 51DA that allows proposed clearing that is not covered by a clearing exemption to be referred to the CEO of DWER for a decision on whether a clearing permit is required, rather than requiring all clearing that is not subject to an exemption or prescribed to be subject to an application for a clearing permit. The CEO must have regard to specified criteria set out in the EP Act.

EDO strongly opposes the proposed introduction of a new referral system as it substantially broadens the CEO's discretion in the absence of a proper and comprehensive review of the clearing provisions and assessment of the state of native vegetation in WA. Further, the decision of the CEO is not subject to appeal. In EDO's view, substantial amendments to the regulation of clearing, particularly amendments which remove existing constraints on clearing, are not appropriate prior to the completion of the current Native Vegetation Issues Paper consultation and policy formulation process.

Reform of existing clearing provisions

The existing provisions in the EP Act are not effective in protecting native vegetation from clearing activities. Despite this, no changes are proposed in the draft bill to existing provisions and processes that apply to clearing where a permit is required, other than the new referral system proposed in the new section 51DA. However, the discussion paper highlights the potential for clearing provisions to be moved to a standalone part of the EP Act, or in the alternative, the development of purpose-specific native vegetation legislation. The discussion paper also notes that key areas of reform should include exemptions, principles and definitions applying to clearing.

EDO supports the development of a new comprehensive framework for the clearing of native vegetation or, at least, reform of the existing clearing provisions in Part V of the EP Act and the supporting Clearing Regulations to prevent continued degradation of native vegetation assets and to ensure ecological connectivity across the State, particularly in highly-cleared areas such as the Wheatbelt, Perth and Bunbury metropolitan areas, and importantly, in the south-west. While Part V Division 2 is intended to protect habitat and biodiversity from clearing, it often fails to do so. This part of the EP Act tends to react to clearing that is harmful to habitat and biodiversity rather than proactively ensuring that it does not occur in the first place.

The EP Act therefore needs to be amended to proactively protect native vegetation. Particular areas of reform should include:

- Reconsidering the placement of clearing provisions in the EP Act;
- Including definitions of key terms relating to clearing;
- Amending clearing exemptions to ensure they are strictly limited and sufficiently defined;
- Amending the clearing principles to require their application by decision-makers to and include consideration of landscape scale conservation, cumulative impacts of clearing and critical habitat;
- Removing the delegation of clearing decisions to other decision-making agencies;
- Improving clearing permit conditions.

Placement of clearing provisions

The placement of the clearing provisions in Part V of the EP Act should be reconsidered. This would help to address the current lack of integration between Part V Division 2 and other key provisions of the EP Act such as the provisions set out in Part IV. In our view the clearing provisions could either be moved to:

a) Part IV of the EP Act, so that applications for a clearing permit would require assessment and approval by the EPA (rather than DWER). In EDO's view, the EPA is the more appropriate authority for making clearing decisions as it is an independent body with the statutory duty to use its best endeavours to protect WA's environment from harmful activities such as clearing. This would also ensure that any impacts to habitat and biodiversity are considered and assessed at the highest level prior to any decision being made and would address issues with integration between provisions of Part V and IV; OR

b) At a minimum, the clearing provisions should be moved to a standalone portion of the EP Act to ensure that the specific protection of native vegetation and biodiversity conservation is the focus of regulation (rather than "pollution and environmental harm"). For this recommendation, we suggest that any clearing permit application that is determined to be "at variance with" the clearing principles should be required to be referred by DWER to the EPA for assessment under Part IV. This would

ensure a second layer of protection for applications relating to native vegetation that is particularly vulnerable.

RECOMMENDATION 2: Amendments to move existing clearing provisions in Part V, Division 2 to:

a) Part IV of the EP Act – making the EPA responsible for clearing decisions; or

b) A new Part of the EP Act – requiring clearing permit applications to be referred by DWER to the EPA for assessment under Part IV in where applications are at variance.

Definitions of key terms

A significant problem in Part V Division 2 is a lack of clear definitions for key terms. For example, section 51O subsection (3) provides:

> *"[the] CEO may make a decision that is seriously at variance with the clearing principles if… in the CEO's opinion there is a good reason for doing so."*

The EP Act fails to provide a definition for key terms in the provision including, "seriously at variance with" or "a good reason". The effect of this failure is that it allows for overly discretionary and inconsistent decision-making as each decision-maker is obliged to subjectively interpret and apply the meaning to the best of his/her ability. While the EP Act does not provide for a particular assessment process to be carried out by the CEO in determining whether a clearing permit should be granted, it is evident in clearing permit decision reports that a somewhat established process is followed by the CEO in accordance with relevant guidelines - *A Guide to the Assessment of Applications to Clear Native Vegetation under Part V Division 2 of the Environmental Protection Act 1986*.[4] These guidelines are not legally enforceable or binding, however. In assessing a clearing permit application, DWER officers are required to determine whether the proposed clearing is "at variance with" the clearing principles. Specifically, DWER officers must decide whether the proposed clearing "is at variance with", "may be at variance with", "is not at variance with", "is likely to be at variance", or "is seriously at variance with" each clearing principle set out in Schedule 5, despite the fact that the EP Act does not define those terms.

RECOMMENDATION 3: Amendment of section 51A to include definition of key terms including "is at variance with", "may be at variance with", "is not at variance with", "is likely to be at variance", or "is seriously at variance with".

Amendments are also required to the definition of clearing in section 51A to clarify that clearing includes mechanical mowing of native grasses. This may also require amendments to include a definition of mechanical mowing.

RECOMMENDATION 4: Amendment of section 51A to include "mechanical mowing" in the definition of "clearing".

Clearing exemptions

Schedule 6 of the EP Act outlines clearing for which a clearing permit is not required (**clearing exemptions**). In total, Schedule 6 and the Clearing Regulations provide for 40 clearing exemptions. This means that there are at least 40 opportunities for proponents to clear native vegetation without being required to apply to DWER for a clearing permit. In EDO's view, the vast number of exemptions is inappropriate. Further, given that exemptions can be read and applied by any person proposing to clear land, it is concerning that the

[4] Department of Environmental Regulation, *A Guide to the Assessment of Applications to Clear Native Vegetation under Part V Division 2 of the Environmental Protection Act 1986* (December 2014).

language used in Schedule 6 and the Clearing Regulations is extremely broad. For example, in Clause 5 of the Clearing Regulations terms such as "reasonable" and "no wider than necessary" are used, and are not defined. The exemptions therefore give substantial discretion to the person wishing to clear native vegetation/proponent.

In EDO's view, the clearing exemptions should be revised to ensure they are strictly limited to clearing in a narrow range of scenarios and are sufficiently defined, in order to ensure environmental outcomes are achieved. In particular, the exemption in Regulation 5, Item 1 of the Clearing Regulations relating to certain clearing that does not exceed 5 hectares should be removed or amended. We note that this exemption was previously limited to clearing that does not exceed 1 hectare. In EDO's view, this 1 hectare limit should be reinstated.

The draft bill proposes changes to Schedule 6 to clarify when a clearing permit is not required for clearing that is done "in order to give effect to a requirement to clear under a written law". In particular, it replaces the reference to "written law" with "prescribed enactment" and specifically lists the legislation to which this exemption applies in a new Schedule to the *Environmental Protection Regulations 1987*. EDO supports this amendment to provide further clarity and certainty in relation to the applicability of this particular exemption. However we emphasise that further amendments are required to ensure the other exemptions are sufficiently limited and defined. Exemptions should be defined narrowly to eliminate the possibility of exemptions applying where there has been limited or no assessment of the impact of clearing.

RECOMMENDATION 5: Amendment of Schedule 6 and the Clearing Regulations to ensure that exemptions are strictly limited and sufficiently defined. In particular reduction of the 5 hectare exemption in Regulation 5, Item 1 of the Clearing Regulations to 1 hectare.

The EP Act also provides for no direct oversight of clearing undertaken under an exemption by DWER or any other regulatory body. Any person may determine at their own discretion whether or not clearing is exempt and if so, how they might go about it. Specifically, there is no requirement for proponents to notify DWER or any other regulatory body that clearing is being undertaken pursuant to a clearing exemption. Consequently, this type of clearing is not recorded or monitored. Not only does this mean there is a lack of transparency to DWER, other regulatory bodies and the public, it also poses serious problems from an ecological perspective. If there is no system or register recording all land that has been cleared in WA, DWER and other regulatory bodies will not be in a position to accurately determine the cumulative impacts, in addition to the impacts that proposed clearing may have on important wildlife corridors.

Further, proponents should not have the discretion to determine whether or not clearing falls under an exemption, and following from this, regardless of whether or not clearing is deemed (by a regulatory body or otherwise) to be exempt, they must be required to report and record the clearing in a centralised system. Decision-makers will then be in a position to refer to the centralised system prior to making a decision to grant or refuse a permit. EDO therefore considers that there should still be a requirement for clearing proponents to refer proposed clearing to DWER or another regulatory environmental body or apply for a clearing permit for all proposed clearing, regardless of whether it considers the clearing is likely to be exempt.

RECOMMENDATION 6: Inclusion of a new section in Division 2 that requires proponents to notify the CEO or another regulatory body of the intention to clear native vegetation under an exemption and the amount of vegetation they intend to clear; and publicly report on the amount of clearing of native vegetation undertaken under an exemption.

Clearing principles

Schedule 5 of the EP Act outlines the principles for clearing native vegetation (**clearing principles**). Under section 51O, the CEO is merely required to "have regard" to the clearing principles. EDO finds it concerning that while the clearing principles underpin the whole of Part V Division 2, decision-makers are only required to have regard, and not apply, them, and they are in no way enforceable.

EDO's view is that decision-makers like the CEO should be expressly required to apply the clearing principles in assessing whether a clearing permit is required.

RECOMMENDATION 7: Amendment of Section 51O to require decision-makers to apply the clearing principles in making decisions in relation to clearing. For example, inclusion of the following text in italics:

> (2) In considering a clearing matter the CEO shall have regard to and *apply* the clearing principles so far as they are relevant to the matter under consideration…

It is unclear how the decision-maker ultimately decides whether the proposed clearing is or is not at variance with the clearing principles. While the guidelines give some examples of clearing that is or is not likely to be at variance with the clearing principles, they do not detail how a decision-maker ultimately calculates the results and determines whether the clearing permit should be granted or refused. For example, if the clearing is determined to be at variance with six principles and not at variance with the remaining four principles, should the clearing permit be granted or refused? Significant discretion is provided to the decision-maker with little in the way of legally binding regulations or policy to direct them in undertaking the assessment and making the ultimate decision.

It is therefore EDO's view that regulations should set out a clear and uncompromising procedure for applying the law and determining how clearing principles are to be applied/weighed and whether a clearing permit is required. For example, refusal and EPA assessments of clearing permits should be required where a certain threshold of "at variance" is met. At a minimum, guidelines that are clear and unambiguous about how the clearing principles should be applied and when clearing will or will not be acceptable and these guidelines should be a mandatory relevant consideration for the CEO when determining applications.

RECOMMENDATION 8: Publication of regulations that outline how decision-makers are to apply clearing principles and make clearing decisions and if required, amendments to the EP Act to ensure that such regulations can be made.

The draft bill proposes to change to the definition of "threatened ecological community" in the clearing principles, in order to provide consistency between the definitions in the EP Act, BC Act and *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). While EDO supports this amendment, we note that the clearing principles do not account for certain factors that are vital to ensuring the survival of ecological communities such as connectivity, cumulative impacts and critical habitat. The Native Vegetation Issues Paper recognises the importance of considering connectivity and cumulative impacts of clearing, stating:

> *"Direct clearing is not the only activity affecting our State's native vegetation. It also faces ongoing degradation through fragmentation and loss of connectivity… The cumulative impacts of multiple pressures means that much of our remaining native vegetation is also at risk."*[5]

A disconnection currently exists between individual clearing decisions and the information used for large-scale conservation planning, monitoring and assessment of cumulative impacts. EDO therefore considers that

[5] Native Vegetation Paper, 2.

Schedule 5 should be amended to provide for three further clearing principles for consideration in the assessment process, specifically:

a) a principle that requires decision-makers to consider landscape scale conservation and connectivity. The International Union for Conservation of Nature (IUCN) accepts that in order to mitigate and reverse biodiversity loss and habitat fragmentation, it is necessary to conserve native vegetation at a landscape scale (known as connectivity conservation).[6] Worldwide, this is commonly done through wildlife corridor initiatives that seek to conserve, restore and protect habitat (such as Gondwana Link in the south-west of Western Australia). Including such a principle would require decision makers to determine whether the clearing is likely to cause impacts to a wildlife corridor.

b) a principle that requires decision-makers to consider the cumulative impacts of the proposed clearing, rather than only considering the direct impacts to the particular land and surrounding areas.

c) a principle that specifically relates to critical habitat and ensures that clearing is not allowed where critical habitat exists. While some clearing principles necessarily include critical habitat, a specific principle addressing critical habitat will ensure that it is considered in clearing decisions.

RECOMMENDATION 9: Amendment of Schedule 5 to include principles relating to landscape scale conservation/connectivity, cumulative impacts and critical habitat.

Clearing permit conditions

Conditions imposed/attached to clearing permits under section 51H are often ineffective, due to issues associated with the drafting and enforcement of such conditions. There are particular concerns about the limited effect and enforceability of conditions that require proponents to avoid and/or minimise damage, with conditions requiring disturbed areas to be rehabilitated and restored after clearing only being designed to react to damage, by requiring rehabilitation of native vegetation that is already damaged or lost.

In relation to offset conditions that seek to compensate significant residual impacts, there is generally little certainty that appropriate vegetation will actually be secured or managed, and impacts successfully offset, and no monitoring or enforcement of compliance with such conditions given the difficulties associated with tracking offsets. EDO recommends the introduction of a provision in the EP Act enabling conditions precedent to be imposed in clearing permits that require proponents to purchase land and demonstrate to an environmental government agency that offsets will be effective prior to clearing commencing.

In EDO's view, clearing permit conditions should also require proponents to publicly report information on all clearing undertaken and compliance with conditions. This will help achieve the key initiative of "better information" in the Native Vegetation Issues Paper, which seeks to explore how to improve the statewide monitoring of the extent and condition of native vegetation in WA.

RECOMMENDATION 10: Amendments to the EP Act to improve the drafting and enforcement of clearing permit conditions. For example, by allowing conditions precedent to be imposed in clearing permits and conditions that require proponents to publicly report on clearing in a state-wide register and their compliance with clearing permit conditions.

While section 51J of the EP Act provides that it is an offence to contravene a clearing permit condition, in our experience, conditions are rarely enforced as there is no requirement for an environmental government agency such as DWER to ensure compliance with conditions. Accordingly, in our view, the EP Act should be

[6] IUCN WCPA Mountains Biome Declaration, 2006).

amended to provide third parties with the opportunity to trigger investigations into, and enforce, compliance with clearing permit conditions.

RECOMMENDATION 11: Amendments to the EP Act to provide third parties with the ability to trigger investigations into, and enforce, compliance with clearing permit conditions.

Review of the Biodiversity Conservation Act 2016 (WA)

There are various issues with the current regulation of clearing under the BC Act. EDO is therefore of the view that review of the provisions of the BC Act is required, to ensure they proactively protect native vegetation and are consistent with the State native vegetation policy.

RECOMMENDATION 12: Review of the BC Act provisions to ensure they are consistent with a new State native vegetation policy.

Some specific concerns with the BC Act are addressed below.

Listing of clearing and climate change as key threatening processes

In EDO's view, climate change and clearing of native vegetation should be listed as key threatening processes under the BC Act. For example, under the EPBC Act loss of climatic habitat caused by anthropogenic emissions of greenhouse gases and land clearance are listed as key threatening processes. The NSW *Biodiversity Conservation Act 2016* (NSW) also includes anthropogenic climate change and clearing of native vegetation (as defined and described in the final determination of the Scientific Committee to list the key threatening process) as threatening processes listed in Schedule 4.

Protection of threatened species, ecological communities, key threatening processes and critical habitat

The current process for listing threatened species, threatened ecological communities, key threatening processes and critical habitat under the BC Act is cumbersome and provides a high level of discretion to decision-makers. There are no requirements under the BC Act for decision-makers to list species, communities, processes or critical habitat and listing under the EPBC Act only has limited legal effect. Accordingly, these provisions are not being effectively utilised to protect species, communities, processes and critical habitat. EDO is of the view that decision-makers should be required to list threatened species, ecological communities, key threatening processes and critical habitat where certain criteria is met, to ensure they are provided with increased protection.

RECOMMENDATION 13: Amendments to the BC Act to require decision-makers to list threatened species, ecological communities, key threatening processes and critical habitat where certain criteria is met.

Critical habitat provisions

Significant discretion is provided to decision-makers under the BC Act in protecting critical habitat, resulting in very few critical habitats being identified or listed in WA. There are two discretionary actions required for the critical habitat provisions to apply: a decision by the Minister to list the critical habitat, and a decision by the CEO to issue a habitat conservation notice to protect it. An offence for damaging critical habitat can only apply if a habitat conservation notice has been issued by the CEO to a particular person in relation to a specified parcel of land, and then only that person can be liable for the offence if they breach that notice.

RECOMMENDATION 14: Review of the critical habitat provisions under the BC Act.

The critical habitat provisions in the BC Act are also not well integrated with provisions in other legislation such as the EP Act. For example, listing of critical habitat does not directly affect decisions under the EP Act relating to clearing or environmental impact assessment, with neither DWER nor the EPA being required to consider impacts to critical habitat in their assessments.

RECOMMENDATION 15: Amendments to the BC Act to require decision-makers to consider impacts to critical habitat when making decisions under other legislation such as the EP Act.

Bioregional plans

Bioregional planning presents an exciting opportunity for the collaboration of local, state and Commonwealth governments to tackle issues facing WA regions at a landscape-scale, such as climate change, fire and invasive species. Bioregional planning also has the potential to reduce fragmented land management and assist in planning connectivity "linkages" between regions, [7] by creating a coordinated framework of planning for environmental, land use and social issues. In addition to the management of cumulative impacts of projects and land use, a bioregional approach provides a mechanism for determining the suitability of areas for development or conservation on a large scale, with the Australian Panel of Experts on Environmental Law stating:

> *"A properly implemented [bioregional planning] approach would protect ecological integrity, whilst ensuring that economic uses are located in the most appropriate places."*[8]

Section 176 of the EPBC Act provides for the preparation of bioregional plans by the Minister for bioregions that are within a Commonwealth area. The Minister may also cooperate with states and territories in the preparation of a bioregional plan for a bioregion that is not wholly within a Commonwealth area. In preparing the plan, the Minister must carry out public consultation on a draft of the plan in accordance with the regulations.

Bioregional plan may include provisions about all or any of the following:

(a) the components of biodiversity, their distribution and conservation status;

(b) important economic and social values;

(ba) heritage values of places;

(c) objectives relating to biodiversity and other values;

(d) priorities, strategies and actions to achieve the objectives;

(e) mechanisms for community involvement in implementing the plan;

(f) measures for monitoring and reviewing the plan.

In EDO's view, provisions should be included in the BC Act that provide for and regulate bioregional plans in WA that are consistent with Commonwealth bioregional plans. The EP Act should also be amended to make

[7] Ibid.
[8] Australian Panel of Experts on Environmental Law, *Terrestrial Biodiversity Conservation and Natural Resources Management* (Technical Paper 3, 2017).

bioregional plans mandatory considerations for processes under the EP Act in relation to clearing and environmental impact assessment, where such plans are relevant.

There are concerns that implementing a bioregional approach at the state level will overlap with bioregional planning provisions in the EPBC Act. However, bioregional plans under the EPBC Act generally relate to "Commonwealth areas" only, unless the Minister cooperates with the WA government to prepare a bioregional plan that is partly in WA. Amendments could ensure that state bioregional plans are integrated effectively with Commonwealth processes.

RECOMMENDATION 16: Amendments to the BC Act to include provisions relating to bioregional plans that are modelled on section 176 of the EPBC Act. Other legislation such as the EP Act should also be amended to require decision-makers to have regard to these plans in making decisions where the plans are relevant.

STREAMLINED REGULATION

The agenda of regulatory efficiency and streamlined regulation has often resulted in the deferral and delegation of responsibility under the EP Act to other regulators or decision-making bodies such as the DMIRS. While EDO acknowledges the importance of regulation being efficient and streamlined, especially given the limited resources of regulatory/government departments such as DWER, we emphasise that this objective cannot be prioritised over, and at the expense of, good environmental outcomes.

EDO supports the clear control of any delegation of decision-making to non-environmental agencies or officers under the EP Act, to ensure these powers are exercised to protect the environment. In particular, we consider that a qualification on the power of delegation is required to the effect that it cannot be exercised to give power to a person or agency that does not have environmental protection as its objective. This would be beneficial for ensuring that decision-making is in the public interest and consistent with the purposes of the EP Act.

At the very least, delegation provisions should be amended to require delegated authorities to take into account the objects and principles of the EP Act in making clearing decisions.

RECOMMENDATION 17: Insertion of a new section 17A, entitled ―Limits on delegation should be inserted in the EP Act to provide: ―Notwithstanding anything in sections 18, 19 and 20, powers and duties under the Act shall not be delegated to any person or public authority that does not have as its purpose or object the protection of the environment. Alternatively, amendments to section 20 to require delegated authorities to take into account the objects and principles of the EP Act.

IMPROVED ASSESSMENT TIMEFRAMES

EDO supports reforms to improve timeframes for assessing and processing applications for clearing permits. Provisions could be included in the EP Act that provide for deemed refusals, in a manner analogous to those operative in planning schemes, where decision-makers fail to meet the statutory timeframes, with appeal rights. Deemed refusal provisions remove administrative delays in decision-making, while preserving applicants' rights, and avoiding undue pressure on decision-makers to issue approvals for clearing without proper assessment. They also help to clarify expectations of the process for proponents, decision-makers and other stakeholders.

RECOMMENDATION 18: Amendments to the EP Act to improve the timeframes for assessing and processing clearing permit applications. Inclusion of deemed refusal provisions where decision-makers fail to meet statutory timeframes.

TRANSPARENT, EVIDENCE-BASED DECISIONS

Transparent Decisions

The international standard for transparency and accountability in environmental decision-making is the Aarhus Convention, under which signatory governments have duties to publish information, facilitate public access and use of that information and maintain appropriately resourced infrastructure to provide and manage this information in accordance with their obligations.[9] Most information relating to Part V Division 2 of the EP Act can be found on the DWER website. However it is concerning that section 51Q(2) requires the CEO "to publish from time to time in a prescribed manner prescribed particulars of the record". While the draft bill proposes an amendment to remove the words "from time to time" and insert "must publish", there is still no regulation that prescribes when a CEO must publish particulars in relation to clearing.

EDO recommends amendments to the EP Act to require the CEO of DWER to regularly report information/data on the clearing of native vegetation and make this information publicly available, for example in a state-wide register.

RECOMMENDATION 19: Amendments to the EP Act to require decision-makers to report all clearing undertaken and clearing decisions made, and for all reporting information to be made publicly available.

Decision-makers should also be required to provide reasons for their decisions in granting or refusing clearing permits. In our experience, the public expects and is entitled to reasons for decision-making that affects their interests. While we note that DWER does publish decisions in relation to clearing applications as a matter of policy, a statutory right to reasons provides greater transparency and accountability, in turn supporting better decision-making and greater public confidence in the administration of the EP Act. As a community legal centre, we also consider a right to reasons to be fundamental for access to justice. Without knowing the reasons for a decision, it is very difficult for a member of the public to understand the basis for a decision and in particular how community views and submissions have been taken into account.

RECOMMENDATION 20: Amendments to require decision-makers to provide reasons for decisions relating to clearing.

Evidence-based Decisions

Given the lack of information and data demonstrating the amount of clearing that has been undertaken and the current status or condition of native vegetation in WA, current decision-making in relation to clearing is based on incomplete information and is not evidence-based. Instead, clearing decisions are largely based on information provided by the party who proposes to undertake the clearing/proponent.

One of the key initiatives in the Native Vegetation Issues Paper is "better information", with the Paper recognising that investing in better information including mapping and monitoring and remote sensing technologies will enable access to accurate, up-to-date data at a minimum cost. EDO supports this initiative. In particular, EDO recommends that a State-wide register of all clearing be established in WA (including approved clearing, clearing undertaken under a clearing exemption, and unauthorised clearing) and the adoption of a best practice monitoring system.

In EDO's view, requiring proponents and DWER to publicly report information on all clearing (including clearing undertaken under an exemption) in a State-wide register will help to ensure that decision-making in

[9] See The Australian Panel of Experts on Environmental Law Technical Paper 8 'Democracy and the Environment' at page 15.

relation to clearing in WA is based on up-to-date and accurate evidence on the state of native vegetation in WA. It will also provide the public with access to reliable and relevant information on clearing, enabling them to participate in environmental decision-making.

IMPROVED COMPLIANCE AND ENFORCEMENT OF UNAUTHORISED CLEARING

EDO supports amendments to improve compliance and enforcement of unauthorised clearing under the EP Act through reporting requirements and opportunities for third party enforcement.

Injunctions

Section 51S of the EP Act provides for the CEO to apply to the Supreme Court for a clearing injunction in respect of a contravention of section 51C or 51J. The draft bill for the EP Act also inserts a new Part VIA Division 5 that enables the CEO of DWER to apply for an injunction to prevent a person from engaging in improper conduct, meaning a contravention of particular provisions of the EP Act including other offences in addition to those concerning clearing.

EDO supports the use of clearing injunctions and the inclusion of Part VIA Division 5, which enables the use of injunctions for environmental offences more broadly. However, we note that for these provisions to be effective in practice, they must be coupled with reforms that ensure better enforcement of the provisions of EP Act. In our view, this should include provisions for third party enforcement, discussed further below, to both reduce the burden on the CEO in applying for conduct injunctions and ensure that the CEO does apply for injunctions when relevant.

RECOMMENDATION 21: Inclusion of provisions in the EP Act that provide third parties with the ability to apply for injunctions for unauthorised clearing.

Third Party Enforcement

The current system of enforcement under the EP Act precludes third parties from initiating proceedings for breach of the provisions of the EP Act and environmental offences, despite these offences concerning injury to the environment and natural resources of WA which are public assets. As a community legal centre we often experience the frustration of clients, with evidence to establish an arguable case and who are prepared to undertake enforcement proceedings (including bearing the costs risks of litigation) in the public interest, in being unable to bring court proceedings where proponents have breached the EP Act or committed an offence and decision-making authorities responsible for compliance and enforcement, such as DWER, fail or refuse to act.

In particular, there are no opportunities under the EP Act for third parties to trigger investigations or prosecutions for unauthorised clearing. Instead, the EP Act only provides the CEO with the power to issue notices or apply to the WA Supreme Court for clearing injunctions in relation to unauthorised clearing. In our experience, clients are often frustrated by the lack of action taken by DWER in response to unauthorised clearing. For example, substantial clearing of approximately 1,200 hectares of native vegetation occurred on the Yakka Munga Station that was not subject to a clearing exemption or clearing permit. While the CEO of DWER issued a vegetation conservation notice stating that the clearing was unauthorised clearing and requiring the proponent to ensure no further clearing occurred, it did not pursue further prosecution action for the proponents' breach of the offence in section 51C.

The EPBC Act and environmental protection legislation in New South Wales, Victoria and South Australia contain provisions that provide for third party enforcement of legislative provisions, with either open standing or expanded standing for particular proceedings. The experience of these jurisdictions indicates that the "floodgates" arguments against third party enforcement are unfounded. In EDO's view, there are many benefits associated with the inclusion of a third party enforcement provision in the EP Act that provides citizens and corporations with the ability to commence court proceedings for breaches. These include:

- Sharing the regulatory burden - removing the burden on the CEO of DWER to bring enforcement action.
- Access to justice - providing greater access to justice for the community.
- Public participation - providing a pathway for the public to participate in environmental law litigation and other matters.
- Accountability - ensuring that regulators and decision-makers discharge their functions according to legislative requirements, as well as holding them accountable. In addition, providing an important safeguard in the event that a regulator or decision-making authority fails to act.
- Transparency – ensuring actions and decisions of regulators, decision-making authorities and proponents are transparent.

EDO recommends inclusion of a provision in the EP Act that provides for third party enforcement. In particular, provisions should be included that enable eligible third parties to trigger investigations into compliance with conditions (imposed in clearing permits, implementation decisions and licences) and commission of offences under the EP Act, and to commence judicial review where adequate action is not taken or there is non-compliance. Such a provision would also provide the public with the opportunity to pursue court proceedings for a breach of the EP Act, such as for unlawful clearing, pollution or environmental harm offences. We note that there are existing legal limitations on the use of this avenue due to standard court processes for striking out such claims, as well as the inherent expenses and costs of litigation, and therefore concerns that third party enforcement would "open the floodgates" is overstated. Comparable jurisdictions with existing third party enforcement rights do not experience excessive numbers of third party claims.

RECOMMENDATION 22: Inclusion of a third party enforcement provision in the EP Act modelled on section 9.45 of the NSW *Environmental Planning and Assessment Act 1979*:

> Civil Enforcement
>
> (1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach
>
> (2) Proceedings under this section may be brought by a person on his or her own behalf or on behalf of himself and on behalf of other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings
>
> (3) Any person on whose behalf proceedings are brought is entitled to contribute to or provide for the payment of legal costs and expenses incurred by the person bringing the proceedings

If it is still considered necessary to impose further restrictions on such proceedings, we consider that an appropriate limit can be in the form of stipulated criteria for standing.

RECOMMENDATION 23: Alternatively, inclusion of a provision in the EP Act providing expanded standing modelled on section 475 and 487 of the EPBC Act:

> A person has standing to bring a proceeding to Court for an order to remedy or restrain a breach of this Act if:
>
> (a) the person is an Australian citizen or ordinarily resident in Australia or an external Territory; and
>
> (b) at any time in the two years immediately before the breach, the person engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment.