



A guide to native vegetation clearing processes under the assessment bilateral agreement

between the Commonwealth of Australia and Western Australia
under the *Environment Protection and Biodiversity Conservation
Act 1999* and *Environmental Protection Act 1986*

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Purpose

The native vegetation clearing assessment processes in Part V Division 2 of the *Environmental Protection Act 1986* (EP Act) have been accredited by the Commonwealth of Australia (Commonwealth) under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and a bilateral agreement for environmental assessment has been established.

This guideline provides information on the Department of Environment Regulation (DER)'s approach, and that of the Department of Mines and Petroleum (DMP) under delegation, to assessing and making decisions on native vegetation clearing applications under the EPBC Act assessment bilateral agreement.

Introduction

The EP Act makes it an offence to clear native vegetation unless the clearing is done in accordance with a clearing permit, or an exemption applies. These laws apply to private and public lands throughout Western Australia.

If a native vegetation clearing permit is required under the EP Act and the act of clearing will have or is likely to have an impact on a matter of national environmental significance (matter of NES), the clearing application may also need assessment and approval under the EPBC Act.

The clearing processes under Part V Division 2 of the EP Act have been accredited by the Commonwealth under section 33 of the EPBC Act and a bilateral agreement relating to the assessment of native vegetation clearing applications has been established. The assessment bilateral agreement commences on 1 January 2015.

The assessment bilateral agreement applies to native vegetation clearing permit processes under Part V Division 2 of the EP Act. DMP has delegated authority to administer the clearing provisions for mining and petroleum activities. Clearing permit applications assessed by DMP under delegation can also be assessed under the bilateral agreement, where applicable.

Under the assessment bilateral agreement if a native vegetation clearing permit is required and the clearing will have or is likely to have an impact on a matter of NES, the assessment of the clearing application including the potential impacts to the matter/s of NES can be conducted by DER or DMP under delegation. The CEO makes a decision on the clearing application under the EP Act and provides the final assessment report to the Commonwealth Environment Minister, who then makes an approval decision under the EPBC Act.

What is a bilateral agreement?

Under section 45 of the EPBC Act, the Commonwealth can enter into a bilateral agreement with a state or self-governing territory and accredit its practices, procedures, processes, systems, management plans and other approaches to environmental protection.

A bilateral agreement is a written agreement between the Commonwealth and a state or self-governing territory.

Two types of bilateral agreements can be entered into:

- If a proposed clearing action is covered by an assessment bilateral agreement, then that action is assessed under the accredited state/territory process. After assessment, the proposed action still requires approval from the Commonwealth Environment Minister under the EPBC Act.
- If a proposed clearing action is covered by an approval bilateral agreement, then it will be assessed and approved by the state/territory. No further approval is required from the Commonwealth Environment Minister under the EPBC Act.

This guide relates only to the assessment bilateral agreement between the Commonwealth and Western Australia in respect of clearing regulated under Part V Division 2 of the EP Act.

Section 45 of the EPBC Act

What is a bilateral agreement?

- (2) A bilateral agreement is a written agreement between the Commonwealth and a State or self-governing Territory that:
- (a) provides for one or more of the following:
 - (i) protecting the environment;
 - (ii) promoting the conservation and ecologically sustainable use of natural resources;
 - (iii) ensuring an efficient, timely and effective process for environmental assessment and approval of actions;
 - (iv) minimising duplication in the environmental assessment and approval process through Commonwealth accreditation of the processes of the State or Territory (or vice versa); and
 - (b) is expressed to be a bilateral agreement.

Why was a bilateral agreement established?

Under a Memorandum of Understanding signed in December 2013, the Commonwealth and Western Australia committed to the establishment of a 'one-stop shop' for environmental approvals under the EPBC Act. To facilitate the establishment of this 'one-stop shop', a new assessment bilateral agreement has been entered into between the Commonwealth and Western Australia.

Implementation of the assessment bilateral agreement will streamline and provide a coordinated approach to minimise duplication between existing Western Australian and Commonwealth processes. It will ensure an efficient, timely and effective process for environmental assessment and approval of clearing actions potentially impacting on matters of NES while maintaining high environmental standards.

What is a 'matter of national environmental significance'?

Matters of NES are those matters identified under Part 3 Division 1 of the EPBC Act and include:

- World heritage properties;
- national heritage properties;
- wetlands of international importance (Ramsar);
- nationally listed threatened species and ecological communities;
- listed migratory species; and
- Commonwealth marine areas.

Other matters protected under Part 3 Division 2 of the EPBC Act include:

- activities involving Commonwealth land; and
- activities of Commonwealth agencies.

The assessment bilateral agreement does not apply to these other protected matters.

What is a 'significant impact'?

A significant impact is one which is important, notable or of consequence, having regard to its context or intensity. The significance also depends on the sensitivity, value and quality of the environment being impacted and the intensity, duration, magnitude and geographic extent of the impact.

It is the responsibility of applicants to identify whether their proposed clearing action will have or is likely to have a significant impact on a matter of NES.

More information on what is a significant impact in relation to matters of NES is available in *Significant Impact Guidelines 1.1* (Commonwealth of Australia, 2013).

If an applicant is unsure whether the action is likely to have a significant impact on a matter of NES, the applicant should refer the action to the Commonwealth Department of the Environment. Referral information is available at www.environment.gov.au.

The assessment bilateral agreement

The Commonwealth and Western Australia have entered into an assessment bilateral agreement which commences on 1 January 2015. The assessment bilateral agreement remains active until an approval bilateral agreement is developed and commences.

Scope

The assessment bilateral agreement applies to actions which occur wholly within WA, including its coastal waters.

Where the clearing action under a clearing permit application that can be assessed under a bilateral agreement also crosses into another jurisdiction such as another state, territory or Commonwealth land or waters, DER or DMP will use its best endeavours to consult and coordinate its assessment and approval processes with the relevant authority in the other jurisdiction.

The assessment bilateral agreement does not apply to clearing in Commonwealth areas, or to clearing of native vegetation undertaken by the Commonwealth or a Commonwealth agency.

The assessment bilateral agreement does not apply to applications to clear which have previously been referred to the Commonwealth and were approved, refused or determined to be clearly unacceptable under the EPBC Act.

The assessment bilateral agreement includes clauses that allow Western Australia to choose not to assess an application under the agreement. For example, Western Australia may choose not to use the assessment bilateral agreement where an application has progressed so far through the EP Act clearing permit process that assessment of impacts on matters of NES through that process is impractical.

Western Australia may also implement an escalation process for dispute resolution. Where these situations may arise, the Commonwealth will become involved in the assessment of the action.

The assessment bilateral agreement applies only to clearing actions determined by the Commonwealth to be a 'controlled action' after the commencement date of 1 January 2015. The bilateral agreement does not apply to clearing applications under assessment by DER or DMP prior to 1 January 2015.

What is a controlled action?

Under **section 67 of the EPBC Act**:

An action that a person proposes to take is a controlled action if the taking of the action by the person without approval under Part 9 for the purposes of a provision of Part 3 would be (or would, but for section 25AA or 28AB, be) prohibited by the provision. The provision is a controlling provision for the action.

A proposed action will be classed as a 'controlled action' if the activity will have a significant impact on a matter of NES under Part 3, Division 1 of the EPBC Act and the approval of the Commonwealth Minister for the Environment to conduct the action will be required as a result. The Minister will decide whether or not to approve the action and attach any conditions based on a number of considerations under Part 9, Division 1, Subdivision B of the EPBC Act.

Submitting applications

An application to clear native vegetation in Western Australia must be submitted to DER, or where relevant DMP under delegation, unless the clearing is exempt from requiring a clearing permit. To determine whether a clearing permit is required or whether an exemption applies, refer to DER's [Guide 1 – Exemptions and regulations for clearing native vegetation](#).

If a clearing permit is required, the applicant must also determine whether the action of clearing will have or is likely to have an impact on a matter of NES listed under the EPBC Act. To identify relevant matters of NES and the significance of the potential impact from the action on these matters refer to the Commonwealth's (2013) *Significant impact guidelines 1.1* available from the Department of the Environment website www.environment.gov.au.

If a clearing permit is not required, the clearing may still need to be referred to the Commonwealth for assessment of impacts matters of NES under the EPBC Act.

If the permit application is to be assessed under the assessment bilateral agreement, the clearing application must initially be referred to the Commonwealth using the approved form(s).

The Commonwealth will then determine if the clearing action is a controlled action and, if so, which matters of NES are controlling provisions for the action. The Commonwealth will notify DER for determination on whether it can be assessed under this bilateral agreement. If the action is to be assessed under this bilateral agreement the applicant is also required to submit to DER or DMP the clearing permit application forms available at www.der.wa.gov.au/nvp. These forms include a requirement to submit a description of:

- the proposed action;
- likely relevant impacts on matter/s of NES (as prescribed through an EPBC Act controlled action decision, if made);
- feasible alternatives to the proposed action;
- possible mitigation measures; and
- assessment of the relevant impacts of the clearing.

Assessing applications

All applications for a clearing permit which can be assessed under a bilateral agreement are assessed in accordance with the requirements under Part V Division 2 of the EP Act and Schedule 1 of the assessment bilateral agreement. The methodology for assessing native vegetation clearing permit applications and matters of NES is described in DER's [Guide 2 – A guide to the assessment of applications to clear native vegetation](#).

Applications to be assessed under the bilateral agreement will be advertised for a 21-day public submission period. If public submissions are received, applicants must prepare a response that summarises or takes into account the issues raised in submissions and may amend their application documentation accordingly. DER or DMP will publish the applicant's public submission response and any revised reports, where required.

All relevant impacts of clearing on matters of NES are identified and addressed separately in the EP Act assessment report. Requirements under the bilateral agreement also mean that these assessments must have regard to relevant Commonwealth policies, plans and guidelines.

Clearing permit applications are assessed to the greatest extent practicable, in accordance with the requirements of the EP Act.

Decision-making

Decisions by the CEO on whether to grant, grant subject to conditions or refuse to grant a clearing permit application are made under section 51E and subject to sections 51O and 51P of the EP Act. Decisions also have regard to the objects and principles of the EP Act as set out in section 4A.

The avoid, minimise, rehabilitation and offset hierarchy outlined in the [WA Environmental Offsets Policy](#) (2011) and [WA Environmental Offsets Guidelines](#) (2014) are considered, and applied.

After the assessment of the clearing permit application is completed, which includes an assessment of the matters of NES, a decision report is prepared and considered by the CEO.

The CEO's decision under the EP Act, the decision report, supporting documents and, where relevant, a plan and clearing permit with any attached conditions are then provided to the Commonwealth.

The Commonwealth then decides whether or not to approve the clearing action under the EPBC Act and, if so, under what additional conditions.

The Commonwealth will make its best endeavours to ensure that conditions attached to the EPBC Act approval are limited to matters not already addressed in the separate decision and conditions attached to the clearing permit granted under the EP Act.

Appeals

Decisions on native vegetation clearing applications made by the CEO are published in accordance with section 51Q of the EP Act and regulation 8 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*. Under section 101A of the EP Act, the CEO's decision is subject to appeal. The WA Minister for Environment must receive the appeal within 21 days of the applicant's being notified of the decision and, after consideration of the appeal report prepared by the Appeal Convenor, make the final determination on the appeal.

Further information on the appeals process should be directed to the Office of the Appeals Convenor at www.appealsconvenor.wa.gov.au.

Compliance, monitoring and auditing

The Commonwealth, DER and DMP will cooperate in the monitoring, compliance and auditing of clearing permits granted under the assessment bilateral agreement.

DER's Clearing Regulation [Fact sheet 4 - Complying with your permit to clear native vegetation](#) and DER's [Enforcement and Prosecution Policy](#), provide further information on compliance and enforcement.

More information

For further information on native vegetation clearing, assessments and compliance, including applications forms, fact sheets and guides, refer to DER's website www.der.wa.gov.au/nvp or contact (08) 6467 5000.

For permit applications related to mines and petroleum clearing activities carried out under delegation, contact the Department of Mines and Petroleum on (08) 9222 3333.

For further information on the bilateral agreement and matters of NES, refer to the Commonwealth Department of the Environment website www.environment.gov.au.

Please refer to the State Law Publisher (SLP) and the Australian Government's ComLaw for copies of the relevant legislations. Free electronic copies are available from the SLP website and the ComLaw website www.comlaw.gov.au.

References

Commonwealth of Australia 2013, *Matters of National Environmental Significance, Significant Impact Guidelines 1.1*, Commonwealth of Australia, Canberra

WA Government, 2011, *WA Government Environmental Offsets Policy*, Western Australia

WA Government 2014, *WA Environmental Offsets Guidelines*, Western Australia

Appendix: Flowchart of native vegetation clearing processes under the assessment bilateral agreement

