Dr Eddy Wajon

RECOMMENDED CHANGES TO ENVIRONMENTAL PROTECTION ACT AND CLEARING REGULATIONS

1. The Environmental Protection Act (EP Act) must be used to provide a framework that actually protects the environment, not simply regulates how one degrades the environment to have a positive benefit for business, consumers and the economy, and streamline approvals to do so.
   The current EPA Act has not really been effective in providing a framework that actually protects the environment, particularly in terms of cumulative impacts, although it may have been somewhat successful in reducing the impacts of large scale proposals.
   Thus, while efficient administrative processes are important, the primary content of the EP Act must be effective rules and regulations which preserve, protect and enhance the environment (Part 1). The amendments must not only simplify and improve the provisions for clearing of native vegetation, as stated in the preamble.
   The currently proposed amendments seem to mainly do the former, ie make it easier to, and get approval to, impact the environment, rather than retain the environment in excellent condition that we can be proud of passing down to our children, grandchildren and their children.

2. The EP Act hierarchy of avoid and minimise clearing must be rigorously enforced through assessment, inspection and prosecution.

3. The EP Act must reduce the discretion of regulatory agencies to allow clearing. Regulatory agencies must look for reasons not to approve clearing, rather than for reasons to allow clearing as is so often currently the case. There is always an excuse as to why clearing should occur, but rarely are assumptions on to the need for clearing challenged or reasons why particular environments should be protected supported.
   An example is the repeated phrase of 'have regard to'. What does this mean? The EP Act must require environmental regulatory agencies to have much **greater** regard to environmental matters than other matters such as safety, housing, transport etc in making its decision on what to allow, since environmental protection is their core business, while safety, housing, transport etc is the core business of other agencies. These other agencies need to make a better case as to why their project should be approved/implemented. If a project is supposed to be so important for the State that significant environmental values are to be lost then the entire rationale for decisions against the environment must be provided to the public (e.g. employment, longevity, costs and benefits, alternatives).
   Clearing must only be approved if it is determined that the project is of such high social and/or economic importance and that no viable alternative to the project or its location exists.

4. Proponents must convincingly demonstrate there are **no** alternatives to clearing, or of clearing the amount requested, before any approval to clear is given.
   Typically, proponents do not provide any alternatives, or if they do, often they use phrases that state that they will clear to the minimum required to achieve an objective (such as safety) rather than describe how this will be achieved or what else could achieve it.
   Projects should be assessed by a team that includes persons with expertise in the matter/proposal (eg road construction in the case of road works or of chemical processes in the case of processing plants), as well as by persons with expertise in the nature and value of the environment impacted (eg vegetation in the case of clearing).

5. There must be no clearing of Threatened or Priority Species or Ecological Communities.
   Threatened or Priority Threatened Species or Ecological Communities are so declared for a reason – they are at risk of extinction and being lost forever. The first priority in managing/ protecting such matters is to leave them alone ie don't clear them. The default position must be that they are not cleared and there must be exceptional reasons provided by the

proponent for clearing them.
In particular, clearing of the Eucalypt Woodlands in the Wheatbelt, of Banksia Woodland and Tuart Woodland in the Swan Coastal Plain and South West, and the Proteaceae Dominated Kwongkan Shrubland of the South Coast must cease and must be banned.

6. There must be no clearing of regionally significant flora, ecological communities or corridors. While of lesser risk of extinction and being lost forever than Threatened or Priority Species or Ecological Communities, these matters are important in the overall health of the environment, including of Threatened and Priority matters, as well of significant to the health of human communities in which they exist. The default position must be that they are not cleared and there must be exceptional reasons provided by the proponent for clearing them. Corridors, and old, mature or significant trees must be recognised and protected through incorporation in the Environmental Protection Act/Clearing Regulations as 2 new, separate Clearing (Schedule 5).

7. Quantitative, scientifically, ecologically defensible criteria and decisions must be used to determine whether any clearing of native vegetarian constitutes a significant impact on Threatened, Priority or regionally significant flora, ecological communities or corridors. Currently, Department of Water and Environmental Regulation (DWER) Decision Reports on Clearing Permits contain totally inadequate and indefensible data and evidence to justify/demonstrate classifying any clearing as insignificant and therefore either being acceptable or not requiring offsets.
One implication of this is that EPA and DWER persons making these assessments should be as or more qualified than those submitting environmental impact assessment flora and fauna survey reports, and should be Certified Environmental Practioners along with the private consultants who prepare such reports. I support certification (Schedule 2, 5A).

8. The cumulative impact of numerous small proposals to clear in already extensively cleared areas must be more closely scrutinised and protected through incorporation in the Environmental Protection Act Clearing (Schedule 5).
The current situation is that although one of the Clearing Principles is to assess whether clearing is occurring in an already extensively cleared environment, rarely if ever is this used to determine that a proposal should not be approved. As a consequence, we keep losing the very vegetation that this Principle is meant to protect, through clearing by a thousand cuts, each one of which by itself might be insignificant, but in totality are disastrous, because they are not considered in their entirety or context.

9. Exemptions from the need to obtain Clearing Permits must be abolished (Schedule 6), and all proposals to undertake clearing must be referred and assessed (Section 51DA), especially in the case of Local Government Authorities wishing to upgrade roads.
The WA Local Government Association passed a resolution at an AGM some years ago to allow Local Government Authorities to clear in road reserves without a Clearing Permit. This will result in the total obliteration of vegetation in Wheatbelt roads reserves and road reserves 20m or less in width, and musty not be approved. There is no need to clear all vegetation in road reserves, even 20m wide road reserves, as amply demonstrated by beautiful vegetation in such reserves in Busselton, Margaret River, Broomehill, Gnowangerup and Gingin.
There are too many exemptions, and too much discretion by proponents to clear without scrutiny. Even (perhaps especially) clearing for fire control purposes (such as for firebreaks and bushfire protection zones) must be assessed on their environmental merits much more rigorously as this is now one of the biggest causes of flora and fauna loss. There must also be much greater scrutiny of the environmental impacts of prescribed or controlled burning as there is ample and increasing evidence that this is having significant impact on flora and fauna extinction.

10. If exemptions from the need to obtain Clearing Permits are retained in the EP Act (Schedule 6) or Clearing Regulations, the wording of what clearing is exempt must be made much

clearer by changing the text into plain English, and by specifically stating what is allowed, rather than (as at present) saying what constitutes an offense, and then listing exceptions. Currently, the wording in the Clearing Regulations is so poor that it is necessary to go back and forth to multiple clauses, and even then it is not clear what is allowed and what isn't.

11. If exemptions from the need to obtain Clearing Permits are retained in the Environmental Protection Act, exemptions for rural properties must be limited to 1ha per year.
Allowing 5-10ha (50,000-100,000 m^2)/annum of exempt clearing on farms is clearing by stealth, and really has nothing to do with routine farm operations such as track, fence or firebreak maintenance or firewood collection, but is related to increased agricultural operations. This needs to be assessed against the Clearing Principles because it is no longer small scale clearing, especially when it is considered that many road upgrade Clearing Permit applications are for 1 ha or less.

12. The EP Act or Clearing Regulations must make clear, or be amended if required, so that clearing without a Clearing Permit in areas, especially road corridors, that have not been cleared with a valid Clearing Permit within the last 10 years is not permitted.
In my opinion, regrowth vegetation that is at least 10 years old has almost as much value as previously uncleared vegetation
There have been several instances in the last few years where there has been uncertainty or even tacit approval for such clearing (eg destruction of Grevillea squiresiae in Mukinbudin) in road verges that have not been maintained within the last 10 years and have mature vegetation.

13. Comprehensive flora and fauna surveys must be undertaken prior to any environmental impact assessment, approval or commencement of clearing native vegetation.
Without comprehensive, site-specific, or at least reconnaissance or targeted, flora and fauna surveys, it is very difficult if not impossible to ascertain the Information in databases, unless part of comprehensive surveys of very close by areas, are only indicative of what might possibly be present. Evidence from Gondwanalink where I have 2 properties is that every patch is different to every other patch. We have 500 species of native flora on our property at Boxwood Hill. 75-80% of the flora on another Gonwanalink property not 10km away is different to ours, and 50% of the native flora on another Gonwanalink property 30km away is different to ours. This is not some uniform environment that you can say what is present even close by with any certainty, so that site-specific flora surveys are quired to determine what is present and what would be lost if it was cleared.

14. Clearing must not be approved if any Environmental Protection Act Clearing Principles are seriously at variance, or if 2 or more Clearing Principles are or may be at variance. (Section 51O(3))
Currently, the EP Act allows clearing to be approved even if all 10 Clearing Principles are at variance, even at serious variance. This is no longer acceptable. We are losing our Green Infrastructure at a rapid rate. Where once we needed more Built Infrastructure at the expense of Green Infrastructure, we now need to retain our Green Infrastructure even at the expense of Built Infrastructure.

15. There must be no clearing of habitat/nesting tree/hollows/mounds of Threatened or Priority Fauna.
Many habitat/nesting tree/hollows take more than 150 years to form. These cannot be replenished in our lifetime, even if we retain all potential hollow-forming vegetation surrounding areas where existing hollows are removed. While some artificial hollows can be used to replace natural hollows, and some fauna successfully breed in these, competition for hollows by widespread and feral species means that more rather than less hollows are required.

16. Mandate 100m buffers around Threatened and Priority Flora and Fauna habitat/nesting tree/hollow/mound.

Currently, the practice or policy is to have 50m buffers around Threatened matters and 10m buffers around Priority matters. I believe this is inadequate to maintain ecological processes such as pollination, moisture capture and retention, propagation, shade and heat protection around the Protected matter, especially if there is a multiple of networks amongst different organisms with different ecological requirements (for example orchids, their associated fungi, the partner pollinators and the pollinator food plant/habitat requirements) to maintain the entire ecosystem. Without even only one of this interconnected network, the Protected matter will eventually disappear. At least with a 100m buffer, there is some chance that it might survive in a sea of cleared land.

17. Environmental Protection Authority (EPA) policies must be applied in assessments under the EP Act. Compliance with these policies must be an express requirement for EP Act decision-making.
There is currently no mention of EPA Policies (as distinct from Environmental Protection Polices) in the EP Act. There must be an amendment to the EP Act to do so and to require the EPA to abide by them in their decision making.

18. Where any approved clearing **is** or **may be** at variance with any of the Environmental Protection Act Clearing Principles, both defensive and pro-active action (offsets) eg both acquisition and revegetation, must be implemented to specifically address the variance (Section 51I(2)).
I oppose offsets in principle, because the end result is still, and always will be, loss of native vegetation, and they will never replace the vegetation that is lost if it is indeed of conservation value. However, if they are to be mandated, they need to be effective, assessed, monitored, easily publically accessible and transparent.
Unless any lost/cleared vegetation is actually replaced, there will be a continuing loss of vegetation, habitat and species. While revegetation and restoration is still an imperfect science, no progress towards success in this endeavours will be made if no steps are taken in that direction. In the last 15 hears, there have been amazing advances in revegetation and restoration in Gondwanalink, of which I have been a part. However, much more still needs to be done to achieve the success Alcoa appears to have had with restoration/plant installation/ecosystem re-instatement on the Darling Scarp in the rest of Western Australia. Further, there is a desperate need to re-clothe our land for habitat, climate mitigation, carbon sequestration and other ecosystem services. Making revegetation and restoration part of everyday business would provide financial resources and incentives to undertake this urgently required task.
Where money is provided to an Offset Fund, the use of that money must be transparent to both the proponent and the public, and used expeditiously. Currently, this does not appear to be the case with DWER's offset fund for Clearing Permits.

19. Revegetation must be undertaken at a 10:1 new:cleared ratio.
Because we are losing our Green Infrastructure at an increasing rate, we need to undertake revegetation at a rapidly increasing rate.

20. All decisions regarding Clearing Permits and EPA assessments must be accompanied by Decision Reports and need to be public documents. Such Decision Reports need to include a written statement of reasons for the exercise of power under the EP Act.
Reasons for making decisions to approve projects that have environmental impacts must be clear and transparent to the public to maintain the credibility of the process and to foster good decision making based on evidence rather then whimsy.

21. Proponents must be required to prepare, and third parties must be able to obtain, completion and audit reports on Clearing Permits and environmental approvals to assess compliance with the implementation conditions.
Being able to access such reports provides the public with assurance that project environmental conditions are indeed being met, and enables issues to be picked up by locals

who are more aware of the situation than regulatory staff.

22. The onus must be on proponents to demonstrate the acceptability of their clearing proposal if it is not approved, rather than on third parties to demonstrate why it is not acceptable (ie through the Appeals process).
Therefore, there should be more emphasis on the regulatory authority, ie DWER or EPA, to not approve a project or Clearing Permit application if there is significant doubt about the environmental impact or lack of information, and allow a proponent to demonstrate that it is acceptable, rather than approve it and allow third parties to object, as is currently the case. This would even the playing field in which currently, especially for most Clearing Permits, un-funded third parties need to expend considerable resources, which they do not have, to scrutinise or challenge a project on which a better-resourced and funded proponent has expended little energy to demonstrate is acceptable.

23. Appeals on Clearing Permits must better review the environmental basis for the approval. Further, appeals must be heard by an expert independent tribunal.

24. Third party submissions and appeals under the EP Act or Clearing Regulations must not attract a fee or bond or be limited in number or scope.
Such a fee or a bond was proposed by Local Government Authorities at a WA Local Government Authority AGM to limit the scrutiny of road clearing proposals. The argument was that such appeals are vexatious and interfere and inhibit the Local Government's ability to maintain its road network. I maintain that requiring a fee or a bond for a third-party appeal is discriminatory, and inhibits the ability of the public to maintain the integrity of the environment.

25. Applications for separate, additional or further Clearing Permits for contiguous or near-contiguous parcels of land must not to be accepted within a 5-year time frame.
This is to prevent such proposals from being assessed separately or as purported minor variations, without the full scope of the project and its full environmental impact being revealed or assessed in its entirety at its inception. The expectation of the proponent if many small proposals or amendments were submitted sequentially would undoubtedly be that it would be difficult for the regulatory agency to refuse a similar amendment or second proposal.

26. Any clearing of native vegetation without a valid Clearing Permit, or prior to approval of a Clearing Permit, must be prosecuted with a penalty exacted.
Currently, it appears the law makes this very difficult for the regulatory agencies to undertake, so as a consequence there are very few attempted prosecutions for unlawful clearing, let alone successful ones. Most transgressions are dealt with by warning letters. I believe these are mostly ineffective as they do not impose a sufficient deterrent or provide a strong-enough example for others.

27. No Clearing Permits or actual clearing must be approved retrospectively, ie after clearing has already occurred, irrespective of whether approval would have been given in any case.
Any clearing must be prosecuted, and the cleared vegetation must be undertaken to be restituted.

28. The community must have the right to initiate third party enforcement proceedings for environmental offences.

29. Fines or Vegetation Conservation Notices for clearing that is unlawful must be applied on the balance of the evidence.
If Police can impose an on-the-spot fine on someone for speeding on the basis of radar or speed camera data, then I maintain Pollution Officers should be given the power, if they don't have it already, to impose a financial penalty on someone who has cleared illegally.

30. Penalties for any unlawful clearing must include revegetation as well as fines.
Financial penalties may not deter some bigger companies from clearing and wearing the cost of a fine as part of the cost of doing business because of the profit accruing from being able to utilise the cleared land. The proposed amendment in Section 99Z(2) may address this issue, in which case I support the amendment, but perhaps it needs to be made clearer what monetary benefit includes. However, requiring the area cleared to be revegetated/restored should also be required, as this takes that land back out of business, so there is no further financial advantage in clearing unlawfully.

31. Apply greater penalties to repeat offenders.
I believe some offenders, including Local Governments, feel they can get away with clearing unlawfully without to great (if any) financial cost, so the only way to deter them from re-offending is to substantially increase the penalty, whether it be financial (larger fine) or non-financial (larger area revegetated).

SPECIFIC COMMENTS PROPOSED AMENDED ENVIRONMENTAL PROTECTION ACT AND CLEARING REGULATIONS

1. In Section 40(5)a,

   'When publishing information or a report under subsection(4) the Authority may—(a)declare the information or report to be available for public review;

   should be replaced with the following

   'When publishing information or a report under subsection(4) the Authority **shall**—(a)declare the information or report to be available for public review;

2. I support the proposal to allow the EPA to recommend whether a planning scheme may or may not be implemented Section 48D(1)(d).
   For too long, planning schemes have resulted in unbridled growth of the Perth Metro area and the clearing of too much bushland, nearly all of which is now a either a Banksia Woodland or Tuart Woodland Threatened Ecological Community as a result. What we now need is for those schemes which have not yet resulted in massive clearing (ie south, north and east of Perth), to be re-assessed, and if necessary, revoked, and for the powers in the EP Act to allow this.

3. Need to change definition of 'native vegetation' in Section 51A to **include** (not exclude) vegetation intentionally sown, planted or propagated. (This is to protect revegetation/ restoration undertaken by private entities (such as the Gondwana Link partners) of their own volition.)

4. Changes to 'Declaration of Environmentally Sensitive Areas' (Section 51B) are generally supported. However, the Regulations proposed under which this is proposed to be done also needs to be transparent and available for public comment.

5. Need to change definition of 'conservation covenant' in Section 51D to include a conservation covenant taken out with the Department of Biodiversity, Conservation and Attractions.

6. There is complete confusion in my mind between Section 51C and 51D as to whether an offence is committed in clearing land on which there is a Conservation Covenant. The legal language obfuscates rather than clarifies the matter.

7. There is too much discretion in Section 51DA with respect to 'small' (what is the definition of small?
   All proposed clearing must be referred. I concur that the CEO (ie DWER) should then decide whether a Clearing Permit is required, based on size, significance, the Clearing Principles etc and the matters listed in Section 51DA(4). If there is to be a limit, 'small' should be something like 0.0001% of the area relative to the total remaining vegetation, or 1ha, whichever is the smaller.

8. Section 51E(1)(d) needs to be much more explicit as to what information is required (see for example my points above 3, 4 and 13). Section 51I explicitly sets out what some possible conditions to a Clearing Permit could be, so why can't Section 51E(1)(d) be more explicit.

9. Need to explain what ' the 'publication regulations' referred to several times in the proposed amended Act are.

10. The discussion in Section 51F about 'proposed clearing' is completely unintelligible. Why is there a difference between 'referred proposal' and 'proposed clearing' in any event if the

'proposed clearing' would not proceed if the 'referred proposal' was not approved?

11. Somewhere in Section 51K-51M, there needs to be discussion/requirement about the CEO inviting any person who wishes to comment on the amendment and information to do so.

12. In Section 51O(2)):

    'In considering a clearing matter the CEO shall have regard to the clearing principles so far as they are relevant to the matter under consideration.'

    should be replaced with the following

    'In considering a clearing matter the CEO shall have **prime** regard to the clearing principles so far as they are relevant to the matter under consideration.'

13. In Section 51O(3),

    'The CEO may make a decision that is seriously at variance with the clearing principles if, and only if, in the CEO's opinion there is a good reason for doing so.'

    should be replaced with the following

    'The CEO may **not** make a decision to approve a Clearing Permit that is seriously at variance with the clearing principles.'

    (In any event, in our experience, under the existing situation, the CEO's opinion that there is a good reason for doing so is rarely if ever recorded in detail, and often does not stand up to detailed scientific, engineering, safety or social scrutiny.)

14. In Section 51P,

    'Despite anything in this section—(a) if the CEO is satisfied that, as a result of environmental circumstances having changed, the environment or an environmental value of the area concerned requires a higher level of protection than would be provided by the standards required by or under any approved policy, the CEO may grant or amend a clearing permit so as to make the permit subject to conditions which specify standards that are more stringent than those required by or under the approved policy'

    should be replaced with the following

    'Despite anything in this section—(a) if the CEO is satisfied that, as a result of environmental circumstances having changed, the environment or an environmental value of the area concerned requires a higher level of protection than would be provided by the standards required by or under any approved policy, the CEO **should not** grant a clearing permit'

15. Comment on Section 51P(4):
    'Subsection(3) does not authorise the imposition of a condition that is contrary to, or not in accordance with, an implementation agreement or decision.' For this reason, the implementation agreement or decision report needs to very explicitly and carefully state what the environmental impacts are that need to be addressed.

16. I support the proposed Section 51R which provides for the use of 'remotely sensed images' as prima facie evidence.
    However, in Section 51R(1), image should include 'video'.

17. Why was Section 51S Clearing Injunctions removed? Is it replaced by, or superfluous to, Section 70?

18. I am very concerned about the use of the proposed Section 74(3)(a)(i) (to justify clearing for the purpose of preventing danger to human life or health or irreversible damage to a significant proportion of the environment), to justify clearing for fire management, where it appears just about anything could be justified irrespective of how large an area is involved (to create a firebreak or buffer for example).
This section must be restricted to imminent danger and to isolated trees.

19. Section 86N seems to imply that an Environmental Protection Covenant can simply be amended "as agreed to by each person who is bound by the covenant" which does not seem to include the CEO. Is this what is intended, and does the CEO not have the final decision on whether and how to amend the covenant?

20. Schedule 6 Item 6(2)C refers to Clearing Permits not required for clearing that is done in accordance with Section 6 and Section 75. However, Section 6 and Section 75 appear to have nothing to do with clearing.

Dr JE Wajon

23 January 2020