

Mining - to clear or not to clear, that is the question

Background

The Environmental Protection (Clearing of Native Vegetation) Regulations 2004 (WA) (Clearing Regulations) and Part 9 of the Environmental Protection Amendment Act 2003 (WA) (Amendment Act) regulate the clearing of native vegetation in the state. Whilst both pieces of legislation have been in effect since July 2004, there is still confusion as to when mining operations require a permit to clear native vegetation. This article seeks to clarify when the exemptions under the Clearing Regulations and Amendment Act are available to proponents.

Low impact and other mineral and petroleum activities

Item 20 of the Clearing Regulations allows clearing for low impact mineral and petroleum activities. 'Low impact mineral and petroleum activities' is defined in the Clearing Regulations and includes such activities as temporary tracks, drilling without fluids, campsites, anchoring vessels and removing marine growth.

The Clearing Regulations also exempt the clearing of up to 10 hectares per financial year per 'authority area' for clearing regulated under the *Mining Act 1987 (WA) (Mining Act)* and a host of petroleum legislation. An 'authority area' includes mining tenements granted under the Mining Act as well as a host of certain licences, permits and leases granted under petroleum legislation. This exemption is particularly relevant for small scale mining operations working on a clear and revegetate basis.

This exemption is not available however in an environmentally sensitive area (ESA) or within 'non-permitted areas' (eg wetlands, riparian vegetation) and must be carried out in a way that limits damage to neighbouring vegetation.

Exploration and prospecting

Items 24 and 25 allow clearing for prospecting and exploration authorised under the Mining Act and petroleum legislation. The exemption does not extend to actual mining, for example a mining lease. Again, the exemption is not available in ESAs and must be carried out in a way that limits damage to neighbouring vegetation.

Works approvals or licences

Schedule 6 of the Amendment Act allows clearing that is done in accordance with a works approval or environmental licence issued under the *Environmental Protection Act 1986 (WA) (EP Act)*. Most mining operations require both these approvals, and whilst at first blush they could be interpreted to implicitly allow the clearing of native vegetation, both authorisations seldom exempt the requirement to obtain a clearing permit. In practice, the words 'in accordance with' mean 'as dictated by the approval or licence'. As works approvals and environmental licences regulate the construction and the operation of the premises, the clearing of native vegetation is not usually assessed. Accordingly, unless the works approval or licence specifically provides for the clearing of native vegetation, a permit is required.

Assessed proposals

Schedule 6 of the Amendment Act allows for clearing that is done in the implementation of a proposal in accordance with an implementation agreement or decision. Effectively, this exemption applies to a proposal assessed under Part IV of the EP Act. Importantly, this exemption does not apply to proposals that have been referred pursuant to section 38 of the EP Act and the Environmental Protection Authority (EPA) decides not to formally assess the proposal. The reason being, whilst a proposal may not be '*likely, if implemented, to have a significant effect on the environment*', the clearing of native vegetation still requires regulating.

Mining tenements pre-dating the clearing legislation

Many mining tenements were granted years, or decades ago, prior to the commencement of the clearing legislation. When proponents were granted a mining lease there was an implied right to clear native vegetation in order to access the minerals below the surface. The commencement of the clearing regulations removes any such implied right and since July 2004 all clearing of native vegetation has been subject to the provisions of the clearing legislation.

How does it affect mining operators?

The key point is that a right to mine does not automatically provide a right to clear or remove the obligation to seek a clearing permit.

If there is any doubt as to whether a clearing permit is required prior to carrying out any activity, legal advice should be sought. The maximum penalty for unauthorised clearing is \$500,000 for a corporation and \$250,000 for an individual, with daily penalties. Additionally, it is a tier one offence under the EP Act, meaning a modified penalty (whereby prosecution is avoided) is not available.

Please contact Paul McQueen, Partner or Rebecca Somerford, Solicitor if you have any query as to whether your company requires a clearing permit.

Environmental Focus Group

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