



Our Ref: 22.7.1

13 February 2004

Acting Chief Executive Officer  
Department of Environment  
PO Box 6740  
EAST PERTH Western Australia 6892

**Dear Sir**

**Environmental Protection (Clearing of Native Vegetation) Regulations 2003**

The Urban Development Institute of Australia (UDIA) is the peak industry body representing the urban development industry and we thank you for the opportunity to provide comment on the Environmental Protection (Clearing of Native Vegetation) Regulations 2003. Please find our comments below.

**Prescribed clearing exemptions**

The exemptions are set out in the Table to r.6 of the Regulations.

*Exemption for small residential lots*

The drafting instruction for the Regulations included an exemption in relation to small residential lots in certain circumstances. UDIA's previous submission in relation to this exemption questioned the uncertainty of the drafting of those circumstances. It appears that the drafter's response has been to completely exclude this exemption, which is obviously troubling for the urban development industry.

It is likely that most clearing on small residential lots will fall within the clause 9, Schedule 6, EP Act exemption which allows 'clearing in accordance with a subdivision approval' granted in accordance with the *Town Planning and Development Act 1928*. However, this exemption does not make it clear whether a subdivision approval will, as a matter of course, allow the usual clearing involved in the implementation of a subdivision, or whether the subdivision approval will have to *expressly* permit clearing.

If the latter interpretation is adopted, which is the approach more likely to be adopted by the DoE, the WAPC will be required to turn its mind to the issue of clearing in respect of each subdivision application, in deciding the extent of clearing permitted to be noted on each approval. This may, in turn, increase the likelihood of the WAPC considering an application 'likely to effect the



environment', thus triggering the s 38 *Environmental Protection Act 1986 (EP Act)* environmental assessment process, which has the potential to cause serious delays and costs to a project.

#### *Clearing to remove danger*

Item 3 allows for clearing to reduce danger to people. It is unclear from the drafting of this regulation how direct the danger must be. For example, the Explanatory Notes to clause 110 of the original EP Amendment Bill 2002 proposed that this exemption also includes clearing to prevent damage to property. It is unclear whether such clearing to prevent damage to property would be permissible if its indirect purpose was to prevent damage to persons.

It is also unclear why an arbitrary height of 2m is imposed on this exemption – it is foreseeable that vegetation of less than this height could also be capable of inflicting injury.

#### *Person authorising clearing*

The Table included in r.6 lists the person whose authority must be obtained in respect of each exemption. In many cases, the person listed in the 'owner' of the relevant land. Given that these exemptions relate to day-to-day activities (which is in fact the purpose of many of the exemptions), it could potentially be inconvenient for occupiers or contractors to obtain an owner's permission before clearing. It also places an undue duty on landowners, given that the offence of unauthorised clearing extends to those who 'allow' the offence under s 51C. It is suggested that the authorised person should be extended to include occupiers, and possibly agents and contractors of landowners.

### **Declaration of Environmentally Sensitive Areas**

The Regulations declare a variety of classes of land to be *environmentally sensitive areas* for the purpose of Section V Division 2 of the EP Act. This means that a permit will be required for any clearing on this land regardless of whether another exemption applies pursuant to section 51C(c).

The areas declared to be *environmentally sensitive areas* are quite wide, and pose significant limitations for urban developers, particularly r.9(g), which relates to all Bush Forever sites (excluding clearing in these areas along roads). It is questionable why exemptions other than that relating to road maintenance have not been applied to Bush Forever sites, for example, clearing necessary to remove danger.

Generally, declarations of *environmentally sensitive areas* are to be made by the Minister in accordance with s 51B of the EP Act, which imposes obligations on the Minister to seek submissions and take these into account in making such declarations. The declarations in the Regulations are made pursuant to s 51T, which is a transitional provision, whereby the *environmentally sensitive areas*



declared in the Regulations will only apply until the earlier of the first Ministerial Gazettal of a declaration under s 51B, or 9 months after Section V Division 2 of the EP Act comes into operation. Thus, these concerns are only of a limited duration, but there remains the concern that the regulation may provide a precedent for a Ministerial declaration.

### **Roadside Maintenance**

Item 20 in the table in r. 6 provides an exemption from the clearing permit requirements for roadside maintenance, if it is in accordance with Schedule 2. This allows clearing within a *lateral clearance area*, the definition of which relies on 'the width and height previously cleared for that stretch of road'.

The obvious concern for those in the urban development sphere is thus the resulting uncertainty for clearing alongside newly constructed roads.

It is assumed that another exemption will apply to the creation of new roads – such as the exemption relating to approved plans of subdivision, or as part of the s 38 EP Act approval process for proposals. Alternatively, a clearing permit will need to be obtained for the first clearing of a new road's verge, which will set the limit for the extent of permissible clearing for future maintenance. It is also unclear whether the reference to the area 'previously cleared' is limited to those areas cleared before the commencement of the new provisions, or whether once a road verge is cleared, the exemption for 'previously cleared' land will then apply.

There remains some uncertainty in relation to the upgrading of existing roads, which could require increased levels of clearing – it appears a permit will be required in such situations.

### **Management area under the *Swan River Trust Act***

Item 16 of the Table in r.6 provides an exemption for the clearing of land authorised under the *Swan River Trust Act*, within the area covered by the Act. However, this exemption appears to be redundant (at least for the 9 month transitional period), as the entire Swan River Trust management area is included as an *environmentally sensitive area*, meaning that the exemption does not apply. This will create uncertainty for developers concerned with projects within this management area – the intent of the regulations is entirely unclear.

### **Appeals against undertakings to grant clearing permits to purchasers**

Regulation 8 sets out the process in relation to undertakings granted in accordance with s 51E(9) of the EP Act. This section overcomes the fact that 'area' clearing permits can only be granted to owners of land, by allowing a prospective purchaser of land to seek an undertaking from the CEO of the DoE to grant a clearing permit following completion of a sale.



The regulations, however, do not make it clear whether third parties can appeal against the issuing of an undertaking. It would appear that this is the intention of the EP Act and the Regulations, given the creation in r.8 of the requirement to advertise such undertakings. The concern is that if there is a third party appeal right against the issue of an undertaking, there is also the general third party appeal right against the issue of the clearing permit itself.

Clarity is required to limit the third party appeal right to the grant of an undertaking, not the subsequent issue of the permit, so that purchasers in receipt of such an undertaking can have the degree of certainty which appears to be the purpose behind the undertaking process.

Thank you again for the opportunity to make a submission on the draft regulations. Please do not hesitate to contact me on (08) 9321 1101 if you would like to discuss any of the matters outlined above.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Marion Fulker', is positioned above the typed name.

**MARION FULKER**  
**Executive Director**