

Submission on the draft Native vegetation policy for Western Australia.

25 October 2021



Environmental Defenders Office

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

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We thank the Department of Water and Environmental Regulation (**DWER**) for the opportunity to make a submission in relation to the draft Native Vegetation Policy for Western Australia (**Draft Policy**). For the purposes of this submission, we have considered the following consultation questions (**Consultation Questions**):

1. Has the policy's context adequately covered native vegetation values, opportunities and challenges?
2. How suitable are the guiding principles in providing a contemporary foundation for managing native vegetation?
3. How well do you support the strategies and outcomes?
4. How suitable are the goals and approaches in guiding implementation of the policy?
5. Which roadmap actions are most important?

We also refer to our previous submission made in relation to the Native Vegetation Issues Paper released in November 2019 (**Issues Paper**).

KEY RECOMMENDATIONS

In principle, the EDO warmly welcomes the Draft Policy. The Draft Policy responds to several recommendations made by stakeholders (including EDO) in submissions in response to the Issues Paper. As set out in more detail below, we consider that the Draft Policy could go further. In saying that, we acknowledge the limited resources of departments such as DWER, and the complex context in which the Draft Policy has been developed.

For ease of reference, the following recommendations are set out to align with the Consultation Questions and are not in order of significance:

1. *Has the policy's context adequately covered native vegetation values, opportunities and challenges?*

Recommendation 1: The Paris Agreement and United Nations Convention to Combat Desertification should be included in the international obligations section.

Recommendation 2: The native vegetation values should include intrinsic value.

Recommendation 3: The native vegetation values should include the utility value of native vegetation with reference to the precautionary principle and principle of intergenerational equity.

Recommendation 4: Principle 14 should be expanded to include further challenges faced by native vegetation such as unsustainable use of natural resources and invasive species.

2. *How suitable are the guiding principles in providing a contemporary foundation for managing native vegetation?*

Recommendation 5: Principle 7 should be amended to note that effective implementation of the CAR system needs to ensure that the reserves are resilient to shocks, and that the system is regularly evaluated and responds effectively to new information.



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Recommendation 6: In line with best, contemporary decision-making practise, Principle 10 should be expanded to include ongoing (and cumulative) impact measurement and monitoring.

3. *How well do you support the strategies and outcomes?*

Recommendation 7: The third outcome should include a specific reference to enforcement.

4. *How suitable are the goals and approaches in guiding implementation of the policy?*

Recommendation 8: Strategy 1, Goal (a) should be amended to ‘regionally tailored *and outcome-based* objectives and priorities’.

Recommendation 9: Strategy 1, Goal (b) should be amended from ‘native vegetation *values*’ to ‘native vegetation *guiding principles*’.

Recommendation 10: Strategy 1, Goal (c) should be amended from ‘innovative solutions’ to ‘innovative solutions *and objectives*’.

Recommendation 11: Strategy 1, Approach (ii) should be amended to ‘regionally tailored and *outcome-based objectives* and priorities’.

Recommendation 12: Strategy 2, Approach (i) should apply regionally tailored objectives at a local level.

Recommendation 13: Strategy 2, Approach (v) should incorporate new technology.

Recommendation 14: Strategy 2, Approach (vi) should account for all the values of native vegetation including *all native vegetation clearing*.

5. *Which roadmap actions are most important?*

Recommendation 15: Roadmap Action 1.5 should be prioritised.

Recommendation 16: Roadmap Action 2.1 should be considered a high priority and require the publication of all clearing and reasons for decisions as a matter of law and policy.

Recommendation 17: Roadmap Action 2.5 be prioritised above all other Actions.



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BACKGROUND

On 15 November 2019 the WA Government released the native vegetation issues paper (**Issues Paper**) for public consultation, which proposed four initiatives – a state native vegetation policy; better information, including mapping and monitoring, improved regulatory processes, and a regionally tailored approach.

Critically, the Issues Paper also acknowledged that the current processes for monitoring and reporting on the state and condition of native vegetation are inadequate:

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

The EPA has also acknowledged the inadequacy of the current regime:

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

DWER has reported that all four of the major initiatives proposed in the Issues Paper received strong support in consultation and have been adopted in the Draft Policy.

Given that that the Draft Policy will underpin the whole-of-government approach to protecting native vegetation, we make several recommendations to ensure the protection and enhancement of the state's native vegetation is not compromised in the pursuit of development. We acknowledge that the Draft Policy is process-orientated; however, we continue to encourage outcome-focused policies with clear targets and thresholds.

We are concerned that any departure from outcome-focused policies or transition too far towards regionally-focused objectives could undermine WA's bilateral agreement commitments and Australia's international obligations. A focus on bioregions is a welcome development that will allow for more effective consideration of cumulative impacts; but this focus should not come at the expense of local landscapes. The use of 'like-for-similar' offsetting in WA already poses difficulties, so any proposal for greater strategic flexibility with respect to offsets must only be carried out in a way that does not compromise ecological integrity at a local level or inadvertently facilitate local extinctions. It is important that Australia continues to adhere to its international obligations, and that this objective is upheld by WA government policy and law.

Applying the mitigation hierarchy, offsets should be a measure of last resort and should certainly not underpin or drive the Draft Policy. If the regional environmental priorities espoused by the Draft Policy are taken to allow a more flexible approach to offsets, such flexibility should not

¹ Native Vegetation Issues Paper, 2.

² EPA Annual Report 2017, 24.



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undermine the like-for-like principle, nor should it encourage the use of offsets as a means of mitigation. In line with the Convention on Biological Diversity's 'Strategy for resource mobilisation':

Objective 4.2: Biodiversity offset mechanisms [should only be considered] (sic) where relevant and appropriate while ensuring that they are not used to undermine unique components of biodiversity.

As the Draft Policy is the first of its kind in WA and comes at a critical point in time with respect to climate action, it is important that the final policy is ambitious, in line with Australia's international obligations and is resistant to being read down.



SUBMISSION

Has the policy's context adequately covered native vegetation values, opportunities and challenges?

The policy's context adequately covers native vegetation values, opportunities and challenges. In particular, the policy correctly emphasises the dire condition of the state's unique native vegetation. This dire condition has been exacerbated by climate change and uncoordinated policy that has resulted in fragmentation as well as ongoing loss and degradation of Western Australia's native vegetation.

International obligations

Australia has a suite of international obligations with respect to protecting vulnerable species and maintaining biodiversity. Naturally, the Draft Policy principally relates to Australia's obligations under the UN Convention on Biological Diversity. However, given that native vegetation also plays a key role in mitigating climate change and combatting desertification, the EDO considers that there are other relevant international instruments that should also be acknowledged and considered in the final policy, in particular the Paris Climate Accords (under the UN Framework Convention on Climate Change) (**Paris Agreement**) and the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (**UN Convention to Combat Desertification**). While we acknowledge that the Draft Policy does cite the UN Framework Convention on Climate Change, it should also cite the Paris Agreement, which is the more recent, and specific, instrument.

Recommendation 1: The Paris Agreement and UN Convention to Combat Desertification should be included in the international obligations section.

Principles 1-2

The Draft Policy rightfully acknowledges the significant range of values associated with native vegetation. In its current form, the Draft Policy particularly emphasises the amenity, economic, environmental, social and spiritual value of native vegetation. Without detracting from these values, the EDO is concerned that taken alone these values are too anthropocentric. In other words, native vegetation is still viewed as an exploitable resource that is only worth protecting because of the value it provides humanity.

In our view, while principles 1 and 2 do touch on the intrinsic value of native vegetation, they are not explicit enough. Regardless of species, native vegetation is worthy of protection as an end in itself. Value does not need to be prescribed or conferred; native vegetation is valuable in its own right.

Recommendation 2: The native vegetation values should include intrinsic value.

Principle 5

The EDO agrees that native vegetation sustains several important sectors of the economy – including agriculture, forestry, fisheries, aquaculture and tourism. Notwithstanding this economic value, native vegetation also provides utility value due to its medicinal properties. For example,



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kangaroo apples are an important ingredient in the manufacturing of oral contraceptives.³ Further, whilst native vegetation may not have a clear utility value now, future generations may be able to use native vegetation for developing new medicine. With these considerations in mind, we believe it is worth highlighting the utility value of native vegetation. In doing so, we believe it is worth referring to the precautionary principle and principle of intergenerational equity (as alluded to in Principles 9 and 10).

Recommendation 3: The native vegetation values should include the utility value of native vegetation with reference to the precautionary principle and principle of intergenerational equity.

Principle 14

The EDO agrees that Western Australia's native vegetation is in a state of decline. This state of decline is attributable to (among other things) unsustainable use of natural resources, changes to the aquatic environment and invasive species. It is also very concerning that this decline has also led to fragmentation of native vegetation. We consider that these challenges should be spelt out further in the 'Opportunities and challenges' section of the Draft Policy.

Recommendation 4: Principle 14 should be expanded to include further challenges faced by native vegetation such as unsustainable use of natural resources and invasive species.

How suitable are the guiding principles in providing a contemporary foundation for managing native vegetation?

In general, the guiding principles provide a strong, contemporary foundation for managing native vegetation. However, as this is a rare opportunity to make long-standing principles for managing native vegetation, EDO considers that these principles should be taken further in order to ensure their longevity.

Principle 7

The CAR system is an internationally recognised mechanism that the EDO strongly supports when implemented to its full extent. However, the CAR system is failing in Australia because it has not been implemented properly. For example, in 2019 the Victorian Government's RFA Scientific Advisory Panel stated:⁴

All SAP Members agree the CAR reserve system has not adequately protected biodiversity, and under current management arrangements, will not provide adequate protection in the future

³ Cheryl Critchley, *The endurance of bush medicine* (13 May 2018, University of Melbourne) <<https://pursuit.unimelb.edu.au/articles/the-endurance-of-bush-medicine>>.

⁴ Regional Forest Agreements Scientific Advisory Panel, 'Scientific Advice to Support Regional Forest Agreement Negotiations' (20 November 2019) <https://www.delwp.vic.gov.au/_data/assets/word_doc/0031/459517/Final-SAP-Report-of-Advice_accessible.docx> 14.



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Further, in the Summer of 2019-20 bushfires had a devastating impact on CAR reserves:⁵

The CAR reserves have been severely affected with over three million hectares of dedicated parks and reserves burned and impacts on policies, prescriptions and other protections in forests available for logging.

Importantly, the CAR reserve system is predicated on comprehensive and up to date information. This information should also factor in the future impacts of climate change. If the CAR reserve system is to be relied upon as an important mechanism, then comprehensive assessment, monitoring and evaluation will be vital for ensuring its effectiveness.

Recommendation 5: Principle 7 should be amended to note that effective implementation of the CAR system needs to ensure that the reserves are resilient to shocks, and that the system is regularly evaluated and responds effectively to new information.

Principle 10

The EDO strongly supports decision-making that is underpinned by sound scientific evidence. For this reason, we believe that an important guiding principle needs to be included concerning impact measurement. Ongoing implementation, adaptation and monitoring of policies is a vital component of contemporary decision-making that is likely to increase in importance over time. Relatedly, impact measurement would also include an improvement in the spatial capture of land management decisions - encouraging data sharing between various stakeholders and decision-makers. Importantly, impact measurement and data sharing improves the ability to assess cumulative impacts.

Recommendation 6: In line with best, contemporary decision-making practise, Principle 10 should be expanded to include ongoing (and cumulative) impact measurement and monitoring.

How well do you support the strategies and outcomes?

In principle, the EDO strongly supports the strategies and outcomes. While the reasons for not including targets and thresholds are acknowledged, we believe that the merit of the strategies will ultimately be determined by outcomes.

Of course, the crux of the strategies and outcomes is outcome one: 'Native vegetation is conserved and restored at landscape-scale'. Landscape-scale conservation is vital to resolve the major fragmentation issue currently faced by native vegetation in Western Australia. Further, it will encourage wildlife mobility. Native vegetation will also play a key role in mitigating climate change. Ultimately outcome one is vital for ensuring there is a nett improvement in the condition and extent of native vegetation.

To ensure outcome one, it is vital that WA implements (and enforces) good policy. To that end, we believe that outcome three, 'Improved policy, practice and evaluation', should be nuanced. Whilst

⁵ Environmental Justice Australia, 'No longer tenable: Bushfires and Regional Forest Agreements' (27 March 2020) <<https://www.envirojustice.org.au/no-longer-tenable-bushfires-and-regional-forest-agreements/>> 4.



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it could be argued that ‘practise’ is all-encompassing, we believe that a separate reference should be made to enforcement.

This nuancing is important if WA wishes to contemporise its native vegetation policy regime. In our submission on the Issues Paper (abovementioned), we recommended the inclusion of third-party enforcement provisions in environmental legislation. Given that such an approach would (among other things) increase access to justice, share the regulatory burden and increase public participation, we think that enforcement should be a key outcome that the WA Government should strive towards.

Recommendation 7: The third outcome should include a specific reference to enforcement.

How suitable are the goals and approaches in guiding implementation of the policy?

In general, the goals and approaches are suitable for guiding implementation of the policy; however, the EDO believes that these goals and approaches should go further.

Strategy 1, Goal (a)

The EDO strongly endorses regionally tailored objectives and priorities. As set out in the Explanatory Notes and other parts of the Draft Policy, it is important that any policy is not entirely process-orientated. As such, we think that any objectives should be tied to outcomes.

Recommendation 8: Strategy 1, Goal (a) should be amended to ‘regionally tailored and outcome-based objectives and priorities’.

Strategy 1, Goal (b)

The EDO believes that all the guiding principles should be transparently addressed in deriving objectives and priorities, not just the native vegetation values. The distinction between native vegetation values and practise is somewhat unclear. For example, the objectives of the EP Act (which are relevant to land clearing) are set out in the native vegetation ‘practise’ section (e.g. guiding principle 10 is the precautionary principle). Further, there are fundamental considerations in the guiding principles that are not ‘values’ and would otherwise not be addressed – particularly decision-making underpinned by sound science and reliable information as well as the need to conserve biological diversity.

Recommendation 9: Strategy 1, Goal (b) should be amended from ‘native vegetation values’ to ‘native vegetation guiding principles’.

Strategy 1, Goal (c)

As set out in Figure 2, Strategy 1 is an important aspect of the policy cycle. Strategy 1 is where new policy is improved upon directly after evaluation of existing policy. The EDO believes that the voices of stakeholders are important not only in finding innovative solutions, they are also important for the creation of objectives.



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Recommendation 10: Strategy 1, Goal (c) should be amended from ‘innovative solutions’ to ‘innovative solutions and objectives’.

Strategy 1, Approach (ii)

We reiterate Recommendation 8 with respect to the need for outcome-based objectives.

Recommendation 11: Strategy 1, Approach (ii) should be amended to ‘regionally tailored and outcome-based objectives and priorities’.

Strategy 2, Approach (i)

In principle the EDO supports the 'regional' focus of objectives. A focus on bioregions is certainly a substantial improvement on the case-by-case assessment currently being employed and will make it easier to assess cumulative impacts. However, regional outcomes should not be used as a cover for facilitating local extinctions. For example, offsets should not be calculated at a regional level but instead should be in the same local area (pursuant to the like-for-like principle).

Recommendation 12: Strategy 2, Approach (i) should apply regionally tailored objectives at a local level.

Strategy 2, Approach (v)

In our view, the use of new technology is complementary to Strategy 2 (and Approach (v) in particular). New technology, including the use of satellite imagery, is pivotal to the Draft Policy’s success and the protection of native vegetation. In particular, mapping, monitoring and remote-sensing technology is vital for enabling access to accurate, up-to-date data at a minimum cost. Developing digital systems to produce and analyse biodiversity data should be prioritised.

Recommendation 13: Strategy 2, Approach (v) should incorporate new technology.

Strategy 2, Approach (vi)

In its current form, Approach (vi) only requires publication of data and decisions which ‘account for the values of native vegetation’. 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 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.

Recommendation 14: Strategy 2, Approach (vi) should account for all the values of native vegetation including all native vegetation clearing.

Which roadmap actions are most important?

From the outset the EDO notes that a suite of further policy and regulatory changes is ultimately required with respect to native vegetation; as such, it is difficult to assess individual roadmap actions in isolation on a piecemeal basis. In any event, the EDO has tried to select some actions which, in our view, need to be addressed as a matter of urgency.



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Action 1.5

As noted above, it is widely acknowledged that the current processes for monitoring and reporting on the state and condition of native vegetation are inadequate. Notwithstanding this acknowledgement, it is important to identify specific areas where the current mechanisms are and are not succeeding.

This evaluation process will undoubtedly require coordination across multiple agencies EDO strongly supports concurrence of different expert agencies, and we support efficiency in principle, but we caution that the latter must not lead to the subordination of environmental agencies to development ones. There is a clear need to re-centralise the legislative framework as well as record all decisions and clearing (regardless of exemption status) in a single place; but similarly, this centralisation should not displace the important role of DWER and the EPA.

Recommendation 15: Roadmap Action 1.5 should be prioritised.

Action 2.1

In our submission on the Issues Paper, we highlighted the need to improve the transparency of decisions with respect to all clearing. Since then, we note the (draft) *Environmental Protection Regulations Amendment (Publication and Confidentiality) Regulations 2021 (WA)*. We believe that the changes proposed by the regulations don't go far enough with respect to requiring *all* reporting information to be made publicly available. We believe that the ambitious changes proposed by the Draft Policy are toothless without transparency – particularly in relation to assessing regulated proposals against relevant objectives and priorities.

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 almost impossible to understand the basis for a decision and in particular how community views and submissions have been taken into account.

Ultimately, given how convoluted regulation of native vegetation is in WA, transparency is extremely important as it underpins the evaluation of the Draft Policy. Publishing all decisions and creating a right to reasons (in law and policy) is an important catalyst for transparency and in line with the international standards set out in the Aarhus Convention.

Recommendation 16: Roadmap Action 2.1 should be considered a high priority and require the publication of all clearing and reasons for decisions as a matter of law and policy.



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Action 2.5

Improving the operational systems, policy and processes for clearing permits under Part V of the EP Act is, in our opinion, the most important roadmap action. There are a number of facets of Part V that need further reform as set out in our previous submission. In particular, we hope that the improved operational system addresses the historic lack of coordination between the various agencies and pieces of legislation pertaining to native vegetation clearing. In our opinion, it is vital that important decisions pertaining to native vegetation are not delegated to non-environmental agencies.

Recommendation 17: Roadmap Action 2.5 be prioritised above all other Actions.