

Land Clearing



Post-fire clearing and authorisation

Any activity, such as raking or ploughing, that damages or removes standing burnt material, stumps, roots, underground reproductive material or seeds from burnt native vegetation in an area that, prior to the fire, was native vegetation is clearing as defined by the Environmental Protection Act and requires a clearing permit or valid exemption to be carried out lawfully.

Authorisation of clearing

In Western Australia all native vegetation (as defined by the *Environmental Protection Act 1986*) (**EP Act**) is protected under the provisions of the Act and can only be lawfully cleared where a clearing permit has been granted for the clearing or the clearing is for an exempt purpose as set out in Schedule 6 of the EP Act or Regulation 5 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (**Regulations**)

Post-fire clearing

A commonly encountered explanation for mechanical clearing that has been carried out is that the landholder was “cleaning up” after a fire.

There has in the past been a number of cases where mechanical clearing of an area has been carried out following a fire, often in these cases the person’s defence is based either entirely or partially on the assertion that the native vegetation had been destroyed by a fire, that the clearing was simply “cleaning up” and there was no vegetation left to be cleared.

Much Western Australian flora is adapted to fire and will recover naturally after a fire, and while factors such as fire frequency, season of the year, fire intensity and pattern, and post-fire environmental conditions may impact the rate of recovery, native vegetation will generally recover following a fire.

Status of burnt vegetation

Section 3 of the EP Act defines native vegetation as

“native vegetation means indigenous aquatic or terrestrial vegetation, and includes dead vegetation unless that dead vegetation is of a class declared by regulation to be excluded from this definition but does not include vegetation in a plantation”.

Note: No class of dead vegetation has yet been excluded from the definition by regulation.

As can be seen from the definition, dead native vegetation is provided with the same protection under the EP Act as living native vegetation, so regardless of the extent to which a fire has damaged or killed native vegetation on a property, the vegetation cannot be lawfully cleared other than in accordance with a clearing permit or valid exemption.

In addition to the standing burnt material, legal advice obtained by the Department is that seeds, underground reproductive material and even the ash from burnt native vegetation remains native vegetation as defined by the EP Act.

Therefore, any activity, such as raking or ploughing, that damages or removes standing burnt material, stumps, roots, underground reproductive material or seeds from burnt native vegetation

in an area that, prior to the fire, was native vegetation is clearing as defined by the EP Act and requires a clearing permit or valid exemption to be carried out lawfully.

The main exemption that can be applied to post-fire clearing is the removal of trees that have been damaged by the fire to such an extent they present a danger to human life or health.

Clearing of dangerous trees

Regulation 5, Item 2 of the Regulations allows for the clearing of native vegetation *for the purposes of preventing imminent danger to human life or health.*

Regulation 5, item (2)

Item	Description of clearing	Person
2	Clearing resulting from accidents or to reduce danger Clearing —	
	(a) <i>for the purposes of preventing imminent danger to human life or health or irreversible damage to a significant portion of the environment; or</i>	<i>The owner of the land on which the clearing is to take place.</i>
	(b) <i>as a result of an accident caused otherwise than by the negligence of the person clearing or the person who authorised the clearing.</i>	<i>A person responsible for the safety or welfare of the persons who are likely to be in danger or for the portion of the environment.</i>

For the item (2) exemption to be applicable there are seven requirements that must be met.

1. The tree/s in question must not be in an environmentally sensitive area.
2. The clearing must be carried out in such manner as to limit damage to neighbouring native vegetation.
3. Consent for the clearing must be obtained from *the owner of the land on which the clearing is to take place or a person responsible for the safety or welfare of the persons who are likely to be in danger*
4. The tree must present an imminent danger

The Macquarie Dictionary defines imminent as *likely to occur at any moment*, therefore, to meet this test it must be demonstrated that the tree presents an immediate danger. It cannot be something that may possibly happen at some unknown time in the future.

An example of how this would apply is, expert advice is received that in its current condition, a tree is likely to fall in storms that can be expected in the forthcoming winter. This would be sufficient to reasonably meet the test of imminent.

5. Danger

With regards to danger, it must be demonstrated that there is actual danger, that is, the tree must be in such a situation that if it were to fall there is a real and reasonable apprehension that someone may be injured or killed.

For example, if the tree was standing in the vicinity of a car park where visitors and or staff regularly parked, walked or congregated then the tree would present a real and actual danger.

If on the other hand, the tree was standing in a paddock not accessed by the public and which could reasonably be avoided by staff, then it could not be cleared under the exemption.

6. The danger must be to human life or health

It is not sufficient that if a tree was to fall it may kill or injure livestock or that a building or vehicle etc would be damaged. The perceived danger must be to the life or health of a human.

7. Clearing must be necessary

It is implicit in the wording of the exemption that the clearing must be necessary to remove the danger presented by the tree.

Where for example a single limb on a tree was deemed unsafe and any danger presented by the tree could be abated by removal of that limb then the removal (clearing) of the tree would not be exempt.

Finally

It is always a good idea to properly document matters related to the tree cleared, written opinion as to why the tree is dangerous and photographs that demonstrate the tree is in a dangerous condition.

If the matter is properly documented then, should the clearing be questioned, evidence is readily available that three presented a danger to human life or health.

Further information

Any other questions please contact the Shire of Denmark on 9848 0300.