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Modernising the Environmental Protection Act: discussion Paper October 2019

1.) Foreword by Minister Dawson p1

The Friends of Wireless Hill appreciate the opportunity to comment on the proposed changes to the Environmental Protection Act.

The problems with Western Australia's approach to environmental protection are apparent from the Minister's Introduction. The idea that there somehow needs to be a "balance" between caring for the environment and caring for the economy is the reason our environment that been steadily and rapidly degraded. If there are any jobs at stake, even in the short term, or a school or hospital is required, there is never any hesitation to clear another piece of our precious and rapidly disappearing bushland. Former school and hospital sites are sold for housing and then bush is cleared to replace the school or hospital. There is no balance.

Every piece of remnant bushland on the Swan plain is now so vital and so needed that there must simply be no more clearing.

2.) Introduction

The Environmental Protection Act (EP Act) has not been effective in protecting the environment, it has only provided a framework that regulates its degradation to provide benefits for business, consumers and the economy.

The primary content of the EP Act must be effective rules and regulations which preserve, protect and enhance the environment. The amendments must not only simplify and improve the provisions for clearing of native vegetation, as stated in the preamble. The use of the term "Approvals process" shows the real purpose of the Act as it is currently and many of the proposed amendments. It is not appropriate to use this term when talking about environmental protection. The purpose of the Act is not and must never be to streamline development approvals. There should be a presumption that a development proposal will not go ahead if it requires clearing or is likely to damage the environment through emissions etc, not a presumption that it must.

New areas of environmental reform

2.1 Bi-lateral agreements with the Commonwealth

The federal EPBC Act fails to protect Matters of National Environmental Significance (MNES). The EPBC Act is itself being reviewed and should be strengthened so that it too actually protects the environment.

So much habitat over Australia is being lost. We have the highest rate of mammal extinction in the world and things are only about to worsen with the impact of global heating, as seen recently. Almost all referrals to the federal government are made by urban developers, mining companies and commercial developers and nearly all proposals are allowed to proceed.

There is no advantage for the protection of WA's environment in bilateral agreements under the current EPBC Act. Given the track record of the federal Act, separate state and federal government assessments should be maintained.

EIA

The Act should be amended such that the Minister may revoke an environmental approval when circumstances that have a significant change on the proposed development area have occurred subsequent to the initial approval. For example a population of endangered birds or animals may have moved into an area.

Time limit on conditions to have substantially started the proposal

It should not be assumed by proponents that a time limit of say five years, can be renewed indefinitely. If a proponent cannot substantially start the proposal as part of the condition of approval, the proponent may be allowed an extension, but a time limit is placed on a proposal for a reason. If the developer cannot proceed, the proponent would have to reassess and perhaps submit an alternative proposal.

3.7 Offsetting

The Mitigation Hierarchy calls for proponents to avoid, minimise, rehabilitate or restore, or offset so that there is 'no net loss of biodiversity'. *'Offsets are actions that provide environmental benefits which counterbalance the significant residual impact of an activity'* (DER Clearing of native vegetation - Offsets procedure under the EPAct 1986).

There can be no offset to the 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 prevent disturbance and loss. 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.

It is simply not possible to make up for the loss of biodiversity when these species/communities are lost. There is also no offset for the destruction of corridors or mature trees which provide connectivity in the landscape.

Since the introduction of the offset policy it has probably been responsible for a large amount of the damage to our unique environment.

3.8 Clearing of native vegetation
I agree that the clearing provisions should be moved to a standalone part of the Act to ensure that the specific protection of native vegetation and biodiversity conservation is the focus of regulation (rather than pollution and environmental harm).

• Reform of the clearing provisions in Part V and in supporting regulations is extremely necessary to avert continued degradation of native vegetation across the State, particularly in highly cleared areas such as the Wheatbelt and the Perth and Bunbury metropolitan areas.

Corridors, and old, mature or significant trees must be recognised and protected. 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.

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).

• Areas of reform should include exemptions, principles and definitions applying to clearing. 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.

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.

Exemptions from the need to obtain Clearing Permits should be abolished, and all proposals to undertake clearing must be referred and assessed, especially in the case of Local Government Authorities wishing to upgrade roads.

The WA Local Government Association push to allow Local Government Authorities to clear in road reserves without a Clearing Permit will result in the total obliteration of vegetation in Wheatbelt roads reserves and road reserves 20m or less in width and must 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 (without having the desired effect on fire control).

If exemptions from the need to obtain Clearing Permits are retained in the EP Act or Clearing Regulations, the exemptions granted must be made much clearer. If exemptions are retained and are given to rural properties, the exemption 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 is not necessary for 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.

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 targeted, flora and fauna surveys, it is very difficult if not impossible to know what may be lost. The flora of WA is so biodiverse that it changes rapidly within short distances. There may be an isolated population of an endangered plant that no one is aware of, cleared due to lack of inspection.

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. Currently, the EP Act allows clearing to be approved even if all 10 Clearing Principles are at variance, even at serious variance. This is unacceptable.

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.
There is no offset.

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 than influence.

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.

Applications for separate, additional or further Clearing Permits for contiguous or near-contiguous

parcels of land should not be allowed 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.

3.10 Compliance and enforcement

I agree with the proposed changes and in addition:
Any clearing of native vegetation without a valid Clearing Permit, or prior to approval of a Clearing Permit, must be prosecuted and penalised. Currently, it appears the law makes this very difficult for the regulatory agencies to undertake, so therefore there are very few attempted prosecutions for unlawful clearing, let alone successful ones. Most transgressions are dealt with by warning letters, which are not enough of a deterrent or provide a strong enough example for others.

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 replaced.

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

Fines or Vegetation Conservation Notices for clearing that is unlawful must be applied on the balance of the evidence. 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.

Penalties for any unlawful clearing must include a requirement to revegetate as well as fines. Financial penalties may not deter some bigger companies from clearing and paying the penalty due to the financial benefit of using the cleared land. Requiring the area cleared to be revegetated/restored will help remove the financial advantage of clearing unlawfully.
Greater penalties should apply to repeat offenders. It seems the financial penalty is not sufficient to prevent unlawful clearing so it should be possible to substantially increase the penalty, whether it be financial (larger fine) or non-financial (larger area revegetated).

3.11 Appeals

I agree that third party appeals should be allowed against decisions to not assess proposals; decisions not to assess schemes, decisions on whether to implement proposals (not only conditions), decisions on works approvals and licences (not only conditions).

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

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. 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.

Climate emergency
Under the object of the EP Act, climate change and greenhouse gas emissions should be a requirement for consideration through administration of the Act.

Proposals that are likely to result in increased emissions of greenhouse gases should be assessed and if approved requirements to offset those emissions must be imposed and enforced.

The review of the Act is an opportunity to strengthen it so that it can meet its objective of protecting our environment and therefore our community and our economy. It is not a matter of balancing one against the other, they are all the same entity.

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