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EPA Act review – notes

In the following, sections highlighted are from the issues document.

1. The amendments will enable recognition of accreditation in line with work of the Heads of Environmental Protection Agencies Australia and New Zealand National Certification of Practitioners Working Group, which was established to improve the level of assurance in the quality, reliability and accountability of environmental reports and documentation provided to government. (p. 8).

   Under section 112, it is an offence to provide information in compliance with a requirement under the EP Act which is false or misleading (p 14).

   This is good but it would be better if there were independent reviews made on relevant parts of the submission by recognised experts selected by the CEO.

   It shouldn't be always up to the public to come up with faults in the proponent's submission, but without an independent review it becomes necessary - and at the cost of the member of the public's time - often expert time.

2. Different conditions may apply to different stages of the proposal, and conditions may prevent subsequent stages of a proposal being commenced until the CEO is satisfied that any specified preconditions have been met (p.14). I agree. This is the safety-first approach that ensures that if the EPA gets it wrong in giving the approval of a project against the advice of various members of the public then they can prevent further damage. It seems that some projects are speculative and the science is not seen to be 'in' or properly tested in reality.

3. Under the current section 45C, the Minister may approve of a proponent's change to a proposal after a statement has been issued, without the need for the proposal to be referred to the EPA. The approval of a change under this section, without EPA assessment, must not occur if the Minister considers that the changes to the proposal might have a significant detrimental effect on the environment, in addition to, or different from, the effect of the original proposal (p. 14). Some Liberal ministers appear to be quite unconcerned about the environment so would be likely to consider any change to be OK, no matter what the evidence. Is there room for the minister to have to get a published opinion from a CEO?

4. The Exposure draft Bill provides for the Minister to issue a notice requiring implementation of a proposal to cease for up to 28 days. ... Section 48(2a) then provides that the decision-maker may exercise any power available to it under written law,where there is non-compliance with the

implementation conditions. (p. 15). But, want to be sure that if harm is being done then it must stop until the issue can be fixed.

5. The Bill brings the assessment of planning schemes in line with those that already exist for assessment of proposals. The EPA's assessment report in respect to a scheme must set out the Authority's recommendations as to whether or not the scheme may be implemented and, if it recommends that the scheme may be implemented, the conditions, if any, to which the scheme should be subject; and the Minister for Environment and Minister for Planning can reach agreement that a scheme may not be implemented. If the Minister for Environment and Minister for Planning reach agreement under the EP Act that a scheme may not be implemented, then that scheme cannot be approved under the Planning and Development Act 2005 (p.16). We certainly don't want the Planning Dept to have power over the environment. It should be an open political decision to override environmental interests.

6. The adoption of this referral-based system will have the effect of ensuring that resources and assessments focus on significant clearing (p. 18). Still need to be sure that it's not death by a thousand cuts.

7. An exemption for clearing to prevent imminent danger is currently available under item 2, regulation 5 of the Clearing Regulations. However, this exemption does not apply to clearing that takes place in ESAs (p 21). But what is meant by clearing? If it is the felling of a tree, perhaps the tree should be felled but not removed.

8. The current uncertainty is addressed by amending clause 1 so that it refers instead to clearing that is done to give effect to a requirement to clear under a prescribed written law, and specifically listing the legislation to which the exemption applies in a new Schedule to the EP Regulations 1987. Schedule 6 also includes new items for known requirements under written laws (p. 26). There should be a requirement that such clearing and the reason for it is recorded. It could be good to require an adequate photograph and map of the area to be cleared.

Notes on wording of the Act itself.

I have been negligent in getting on with looking at the proposed legislation itself. However, I have seen Dr JE Wajon's submission and I have a few comments to make in support. I agree with his sentiment that the changes are more about looking fair than about giving our citizens confidence that our environment is being looked after. It could have been good to have an appointed team of people devoted to the environment to check out the new legislation during its development. I'm sure many would have been prepared to do that free of charge, especially if there was a bias towards environmental protection.

1. Probably need an environment court. In Section 40(5)a the word **may** is used. If the word **shall** is not acceptable by itself then this should have the extra qualification that 'the Authority **shall unless** giving reasons that would be acceptable to the environment court'. However, given that we don't have an environment court then specific reasons for not making a report not available for public review. Does it mean, however, that the report will be available for public viewing, just not for reviewing, or both? If made available to the public to view then the public could appeal against the Authority's decision based on reasons supplied in the document.

2. New 51E1(d) replaces some specific requirements with something more general but could be worse for citizens looking at it. At least a management plan and a map give us something to understand what the proposal is. Perhaps the wording should be such as to make it clear to a third party just what the proposal is and why.
3. In 51DA(4)(a) the term <u>small</u> needs to be defined. It also shouldn't necessarily be small in relation to what is remaining since if the total area is quite fragmented or it is important to biodiversity (not just vegetation) or provides a corridor connecting other areas of vegetation and possibly other factors an expert can think of, then the area can still be locally significant and of community value.
4. In Section 51O(2), there should be emphasis on strong bias towards the environment and therefore have **prime** regard to relevant clearing principles.
5. In Section 51O(3), the CEO should **not** approve a clearing permit that is going to cause environmental harm according to the clearing principles unless there is a highly **exceptional** reason for doing so.
6. In Section 51P, the CEO should not grant a clearing permit if the required protection is not covered by the standards of an approved policy. Currently the section is biased towards clearing rather than environmental protection.
7. In the proposed Section 74(3)(a)(i), not just the clearing must be justified but also the size of the area cleared.

3 Further issues for consideration

3.1 New ideas

- Include new provisions under the EP Act to ban certain products or product classes. I presume this relates to pesticides and herbicides which are usually banned for health reasons. But DDT was banned for environmental reasons which was the right thing to do. Researchers might need special approval to use so it might be better to licence the use of products rather than ban them.
- Resources provided for third party and community participation in environmental impact assessment and environmental regulation.
    - I would prefer that there was little need for the public to put in submissions. Third party involvement should greatly assist here. However, the breadth of knowledge required to assess a project might require paid input from various experts around the world. Therefore third party input might not just be a panel of local experts.
    - I disagree with a premise that I have seen of the legislation that the amount of public input is important. Surely the science should speak for itself. Perhaps quantity of public input is meant to highlight the public's tolerance of risk which I can see could be difficult to assess otherwise. However, perhaps risk can be mitigated by a staged approach to implementation. This might not suit proponents but where they cannot establish that there is no risk then perhaps they'd prefer not to go ahead if they have to stage their project with the chance that it might have to be disallowed at some point.
- DWER administers funds in some areas as a result of approvals under the EP Act but there are no specific head powers or hypothecation of the funds specifically provided for under the EP Act. I don't know what this means.

3.2 Delegations

- Clearly control any delegation of decision-making to non-environmental agencies or officers, to ensue these powers are exercised to protect the environment. Makes sense to have a Memorandum of Understanding for each project. Perhaps experience would enable a general MOU to be developed over time that would cover most projects.

3.3 Role of the Environmental Protection Authority

- Require EP Act to prepare and publish its policies on environmental impact assessment and environmental protection in a manner consistent with the objects and principles of the Act, and ensure that these published policies are mandatory considerations. Hopefully this would make decisions more consistent. Presumably if a difficulty arises there could be either written exemptions or additions and made public. Indeed, such amendments could be

agreed to by an official third party? In time it may be that the policies could be amended to incorporate general changes.

- Part 2 should include eligibility criteria for the appointment of EPA Board members as a schedule to the Act, which is developed following public and professional consultation. It makes sense to me that there could be a panel of experts appointed so that the appropriate ones could be chosen by the CEOs of EPA, DWER, DBCA, DMIRS and possibly DPLH and the Chairperson for each project. From time to time people are not available so it would make sense to have a panel to select from. Certainly professional consultation would be desirable in developing the criteria.
- Remove duplication issues between the EP Act and the Heritage Act 2018. The EPA is not the best entity to assess heritage or culture. I agree. The EPA should concentrate on environmental and natural heritage matters. However, it is reasonable for human heritage to be considered as part of the assessment but this aspect could be passed to a relevant authority for determination as to a level of importance. The minister can decide whether or not to override heritage if the environmental aspect is acceptable.

3.4 Environmental Protection Policies

- Section 33 of the EP Act be amended to require public input into the EPA's advice to the Minister on the revocation of any existing environmental protection policy. Given the effects on projects I would expect public or expert consideration of approving or revoking an EPP. Further, the EPA should note the issues contested and provide written reasons for their acceptance or not.
- Parliamentary approval should also be required to validate the Minister's decision as in the case for any new environmental protection policy. This could be done in the same way as changes to regulations are made.
- Revise Part III to facilitate the broader adoption of environmental protection policies.

3.5 Assessment

- The EP Act be amended so that the EPA's criteria for determining significance are contained in the body of the Act rather than in the separate administrative procedures. I'm not in a position to make a recommendation. A case would need to be made. Certainly, if the procedures are part of published policies that are approved separately to any project then they aren't likely to change much and it might be better to make a change to the procedures rather than wait for a change in the Act. A government hostile to environmental protection is the only issue – there should be no power of government to influence the EPA.
- Section 38A of the EP Act be amended to make it mandatory for the EPA to explicitly consider and report on the cumulative impacts of every proposal it receives. Sadly, the existing procedures do not allow cumulative nor indeed resultant environmental effects to be considered in the decision on a project. In the case of the Yanchep Rail Extension the EPA approved the project only on the

basis of the project itself, not on the repercussions for 6,500 ha of natural areas that would be subject to clearing as a result.

- Section 44(3) be amended to clarify that the government may not request or direct the EPA to alter the content of any of its reports prior to publication.

Agreed. It is essential that the EPA's reports are its own. There can be no confidence in the EPA if this is not the case. In fact, there would be no point in having an EPA if the government could make changes to public reports.

- A review of section 48A of the EP Act be undertaken, together with an amendment of the regulations requiring the EPA to seek public comment on the content of its assessment of planning schemes. I'm certainly very concerned about the way that very good, locally significant bushland can be cleared seemingly just with the approval of the WAPC. The planning departments of local government do not seem to have the same values as their environmental departments which can just pass on the developer's assessment and include public comments on it separately.
- The current separation applied to planning schemes in the EP Act should be removed, and these should be subject to Part IV in the same way as other significant proposals.
- A confidential peer review process be introduced as a requirement of the EP Act to assess environmental review documents prepared by proponents, similar to the process used for academic publications, with costs recovered. My comments are the same as in 3.1 above. However, I forgot about costs. Here a community panel might be cheaper, but I do prefer peer reviews of relevant parts of a proposal. Given the time it could save the community on making time-consuming submissions, perhaps there could be a government subsidy in paying for a peer review.
- Broader powers for strategic assessments to allow cumulative impacts to be more fully considered and regionally important environmental values protected.

Strategic assessments are OK if they accommodate species recovery/protection plans. No species should be forced into the Threatened status by any plan and no Threatened species should be subject to further threat by such a plan. These days we also have to consider fire risk exposure as well. No action under any project should jeopardise the status of the habitat of a species. No artificial plantings should be allowed to replace original habitat. Strategic assessments that cover ecological boundaries might be better off staying well within a regional boundary and another assessment to apply to the boundary areas, since boundary areas can be particularly species rich/diverse.

3.6 Decision-making

- The EP Act be amended to require decisions made under Parts III, IV and V give effect to the objects and principles as contained in section 4A.
- Include statutory criteria for decision-makers to have regard to when making decisions under the EP Act. Anything that makes the job of decision makers easier is good. It should be standard procedure to have a checklist. The

checklist can be added to with experience. Perhaps the statutory criteria should be a minimum set?

- Require all decision-makers under the Act to provide written reasons where requested. I note that the proponents are required to respond to submissions, however there is nothing to indicate what the EPA thinks. We presume that the EPA agrees with the proponent. If a valid point has been made then reasons why it is not upheld should be given. I get the impression that sometimes the reason would be that it is outside the terms of reference and therefore the EPA does not have the power to consider it (such as in the Yanchep Rail Extension case). Such reasoning would be of public interest.
- Add statutory criteria for recommendations by the EPA as to whether a proposal may be implemented. Not sure how this differs from a previous point. The alternative seems to be to have firm policies for assessment. I'm happy for alternative suggestions to be implemented so we get a track record of outcomes before trying something else.
- Section 46 of the EP Act be amended to allow the Minister to revoke an environmental approval if new evidence about the potential for significant environmental harm becomes available. Agreed. This would be in line with the staged approach. However, some compensation might be in order if a significant risk has not been recognised by the EPA prior to approval. Perhaps the compensation could be along the lines of a term payment with a maximum payment per financial year? Presumably we don't want environmental harm done.
- The power to amend works approvals, licences, land clearing permits or implementation agreements or decisions should be limited to administrative changes. Any substantive changes to such approvals should be subject to robust environmental assessment conditions. I don't have experience of issues with the current process to comment.
- Require that any significant amendment of implementation conditions be assessed by the EPA at the same level of public consultation as occurred when the original proposal was assessed. The EPA decides on the level of assessment in the first place so it should have the power to decide what to do with amendments to implementation conditions. Perhaps a written third party opinion should be given to the EPA?
- Section 44 of the EP Act be amended to require that, wherever possible, the EPA impose clear and objectively verifiable conditions so that compliance can be assessed and monitored using measurable outcomes. It might be better to do an evaluation of the EPA's decision every 5 years or so. Alternatively the EPA could publish a list of approvals and the public and/or a third party could require an evaluation of certain projects, giving written reasons for their recommendations. As any evaluator will advise, requiring specific measurable outcomes can result in a very undesirable set of outcomes.

- Clarify how the time limit for implementation of a proposal works. I agree that if a proposal is to be shelved then there should be no impediment to prevent further expenditure by the proponent.
- Additional post approval administrative powers that could enable multiple Ministerial Statements to be rolled into one, or conversely to split a proposal into two or more Ministerial Statements. I don't see the benefits of this.
- Clarification in respect to derived proposals, including that they are subject to a Ministerial Statement. I haven't come across derived proposals.
- Clarify revised proposal provisions, including constraints to decision-making and implementation. This could be interesting if it clarifies to submitters any constraints on the EPA's ability to protect against environmental harm.
- Where the EPA relies on other regulators to achieve its environmental objectives, it must verify and substantiate the level of environmental protection achieved through such third parties. It also must not have the effect of diminishing community and third party participation through reductions in transparency, consultation or appeal rights. Annual written reports, available to the public, could greatly assist to emphasise to these other regulators, such as Town Planners, their responsibilities and the fact that their decisions are made explicit.
- DWER and EPA to not make decisions or allow activities that are inconsistent with Recovery Plans under the Biodiversity Conservation Act or EPBC Act, or which would result in increasing threat to a listed species or habitat, or increase a threatening process. Perhaps there is a quick way of ticking boxes. However, I note that DWER crosses some boxes but still approves vegetation clearing. If that would also happen in this case then it's pretty pointless.

3.7 Offsets

- The EPA's policies and guidelines be amended to regulate and minimise the use of offsets and make explicit the circumstances under which they can be applied. I certainly agree with minimising the use of offsets, especially where one good area is 'swapped' for another on the assumption that the good area being saved could be cleared without needing approval. There may be situations where I could agree with offsets, in which case they should effectively put a price on that activity (e.g. carbon dioxide emitters). For vegetation I would like to see a resource rent tax such that areas deemed natural should be kept in good condition and a resource rent tax applied accordingly until such time as they are put into good condition. When someone wants to clear the bushland, such as for a mine, they should pay a resource rent tax on the land until such time as it is rehabilitated to the required standard.

3.8 Clearing of native vegetation

- 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). The case seems clear and supportable. But native vegetation should be a subset of biodiversity conservation. There's more that lives in natural areas than just plants, fungi and moulds.

- Alternatively, a purpose-specific native vegetation Act could be developed to regulate the clearing of native vegetation and to provide for arrangements relating to carbon farming. Once again, native vegetation needs to be a subset of biodiversity.

- Reform of the clearing provisions in Part V and in supporting regulations is 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. It would seem that the current situation is almost useless at protecting what's left of an already excessively cleared region.

- Areas of reform should include exemptions, principles and definitions applying to clearing. If remnant native vegetation cannot be saved in the wheatbelt then the current situation is nowhere near good enough.

3.9 Industry regulation

- Include a power to license mobile plant and equipment. I've seen good bush being cleared by a grader just to do gold mining/prospecting.

3.10 Compliance and enforcement

- The amended EP Act should require financial assurances to be imposed on all approvals under the EP Act. This is necessary to protect against environmental impacts and to address financial risks to the Government. Perhaps more than assurances are needed – as soon as clearing starts a resource rent tax should start. Once production starts then a certain amount needs to be paid into a trust fund. The agreement should allow all plant and equipment could be confiscated in the event that the company fails to get to the production stage to help pay for restoration.

- Modernise enforcement options including review of the offences and defences, consideration should be given to introducing civil penalties and civil remedies and the option of third-party enforcement. If there are no prosecutions for acts of environmental harm but the motive can be clearly seen then something needs to change to allow people to be prosecuted. At least they should not be able to benefit. If on their property surely it is up to them to

explain rather than the regulator prove the case? People with registered graders might have to keep log books?

- The funding arrangements for the EPA be reviewed to ensure that the auditing and compliance is able to be carried out effectively. If an issue then could be good for all concerned.

3.11 Appeals

- The current structure of Part VII is currently not optimal in terms of clarity and logic, which is in large part due to the initial drafting of this Part and also due to numerous sets of Part VII amendments made from 1994 to 2010. It is recommended that it be restructured to streamline and modernise the format, reduce duplication, and clarify intent.

- 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). Perhaps a recognised third party with members drawn from community groups could appeal? They would need to be paid something, however, since there are so many projects to consider. However, it could be worth a trial period for anyone to appeal – with a sunset clause. Similarly, for the recognised body once the first sunset clause has passed.