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Look forward

Strategy Policy - Environmental Protection Act 1986 amendments

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CCWA submission to Environmental Protection Act 1986 amendments consultation

The Conservation Council of Western Australia (CCWA) is the state's peak environment and conservation organisation representing over 100 environment and conservation organisations throughout the state, as well as tens of thousands of individual supporters and the broader environmental interests of the WA community as a whole.

1) Limited submission and EDO submission

Due the consultation process for this reform package occurring over the holiday period, at a time of catastrophic fires, and at the same time as a range of other significant consultation processes including reforms to WA's native vegetation clearing regulations and the proposed development of Australia's most polluting fossil fuel project, CCWA has not been able to make a comprehensive submission to this important process. The following points are provided as an abbreviated submission.

CCWA has provided input to the Environmental Defenders Office (EDO) who have provided comprehensive submission addressing the legal considerations in the proposed reform package. CCWA generally endorses the overall comments and direction take in the EDO submission.

2) Scope and process for reform to the Act

We are disappointed that there has been no comprehensive review or evaluation of the effectiveness of the Act to identify areas of reform that are necessary, including with the benefit of input from stakeholders and experts. Such a process would uncover areas of agreement among stakeholders and provide an evidence-base to underpin proposed reforms. Instead, the consultation documents describe a 'grab bag' of largely administrative changes that lack coherence as a reform package and do little to address some of the significant inherent and structural deficiencies in the Act. This is a significant missed opportunity.

3) Climate change and carbon pollution

It is perplexing that the issue of climate change and carbon pollution is not even mentioned in the discussion paper, given that:

- Climate change is the most urgent and important environmental issue facing the state,
- WA is the only Australian state with rapidly growing carbon pollution
- In the absence of other purpose specific legislation, the EP Act provides the only legal mechanism for the regulation or management of this pollution source
- There are significant concerns regarding the scope of the Act and its various sections to deal with this issue.

Clearly no package of reform to the EP Act that ignores these issues regarding climate change and the regulation of carbon pollution can be considered comprehensive, or adequate.

The reasons for leaving this critical area of public interest and environmental effect area out of the consultation process can only be guessed at. Perhaps the State Government is planning to introduce specific climate change legislation, and/ or believes that climate change is a Commonwealth Government issue only.

We submit that even if there is a comprehensive climate policy introduced at a Commonwealth level and the state has specific climate legislation, there is still a fundamental and urgent need to clarify and improve the functionality of the EP Act in this area, because the scope and nature of policy instruments established at the Commonwealth level or under specific WA legislation are unlikely to cover the field, specifically they will not cover all sources of carbon pollution (as it would be impractical to do so), they will not provide regulatory instruments that are integrated with industry licensing etc. and they are unlikely to address critical matters such as climate change and carbon pollution in Environmental Impact Assessment. Therefore, improvements to the EP At are still required.

CCWA submits that the current interpretation of the Act by the DWER, which holds that PartV licenses and attendant regulatory and compliance instruments aimed at pollution control and preventing environmental harm cannot address carbon pollution is ridiculous and perverse.

Either this interpretation needs to change to reflect the contemporary scientific understanding of carbon pollution and its causes and effects, or, preferably, the Act needs to be changed to clarify that carbon pollution does fall under the scope of this part of the Act, including the licensing and other provisions related to pollution control and prevention of environmental harm.

As we have seen with projects such as the Gorgon LNG project and its failure to undertake required carbon abatement measures prescribed in the Ministerial Statement, the reliance on Part IV provisions and Ministerial Statements for regulation and prevention of carbon pollution is not effective or practicable on its own.

Clearly the regulatory tools available under Part V of the Act must be able to be used to address carbon pollution from licensed activities and premises and other activities which are causing environmental harm through the release of carbon pollution.

4) Native Vegetation Clearing

We are disappointed that the proposed EP Act reform package does not appear to align with the policy intent of the Native Vegetation management discussion paper, which is to improve the protection of native vegetation across WA. We are concerned with proposed changes to the EP Act would appear to broaden the current exemptions from native vegetation clearing permits which would further compromise environmental outcomes, without addressing any of the other longstanding concerns with the way this section of the Act operates and the degree to which it delivers adequate protection of the environment.

CCWA is preparing a major submission to the discussion paper that DEWR has released on native vegetation clearing which will contain within it a significant focus on regulatory and legal reform that we believe is required in this area. We request that submission is taken into consideration as input into the EP act reform process.

Western Australia continues to experience 'death by a thousand cuts' and loss of significant biodiversity while basic information to understand the overall scale, extent and pattern of clearing is absent. In effect, the government is 'flying blind' while sanctioning clearing. The overall impact, or effectiveness, of clearing regulations is unknown after 15 years of the introduction of regulations in 2004. There are no stated purpose or goals on the use of clearing regulations under the EP Act, and a lack of contextual information to inform decision making, an overarching policy framework and provisions for State of Environment reporting.

Substantial reforms of the Act and the and Environmental Protection (Clearing of Native Vegetation) Regulations 2004 are required to achieve proactive native vegetation protection and management.

This must move beyond regulating clearing in a way that essentially focuses on vegetation at risk, to prevent vegetation from becoming at risk. This will require either substantial new additions to Part V or a new standalone part to the EP Act, or new legislation aimed specifically at vegetation management within which clearing is regulated but broader powers and functions for protection are provided. Clearing regulations should deliver an overall environmental net gain, both from the perspective of biodiversity and habitat protection as well as maintenance and enhancement of carbon stored in the landscape and mitigating greenhouse gas emissions resulting from the loss of native vegetation.

Reforms are also are needed to constrain the broad range of exemptions, provide for greater openness and transparency of decision making, provide a system of reporting on all authorised clearing, improved administration and greater need for protection mechanisms, such as mandating and expanding environmentally sensitive areas.

5) Reform to Appeals process

All stakeholders agree that the current appeals process is unsatisfactory and is in need of reform and we believe this is a high priority. There are various models and proposals for how this could be achieved, and we note the proposals from the Leuwin Group and the EDO in this respect. One option is for the State Administrative Tribunal (SAT) to be given the powers to deal with environmental appeals. CCWA's preferred option is to create a dedicated merits- based land and environment court or similar which would bring WA in line with other similar jurisdictions.

6) **Introduce third party enforcement powers**

Many other jurisdictions have established provisions that allow members of the public (or other third parties) to initiate legal interventions or instruments to prevent or stop activities that harm the environment or cause pollution. The EP Act should be amended to include such provisions and we support the proposals contained in the EDO submission in this respect.

7) **Clarify powers for preventing and controlling pollution and environmental harm.**

As the Act stands currently, activities that have been approved by any government process (such as approvals under Mining or Petroleum Act's) may be exempt from prosecution for pollution or environmental harm as they may be considered to be authorized activities under the EP Act, even though in many cases there has been no Environmental Impact Assessment or other analysis of the potential for the activity to damage the environment. A case in point is gas fracking activities (for example for exploration) which has not been subject to EIA under Part IV, and which is approved under the PGER Act.

Section 74B(1) of the Act extends a defense to proponents who can show that the environmental harm resulted from an authorised act which does not contravene any other written law. This is far too broad a defense which is extended to authorisations that may be issued pursuant to any other legislation without regard for environmental impacts or consequences. The EP Act should be clarified to ensure that activities which result in pollution or environmental harm can be prosecuted or prevented through the use of Environmental Protection Notices or similar, even where other authorisations have been given under other legislation.

8) **Introduce provisions to ban certain products or product classes.**

There are a range of products and product classes that should be banned due to their environmental impact. This includes certain types of single use plastics, as has been the case in other jurisdictions. Currently the Act lacks specific provisions for this, and this should be changed through the addition of new powers for this purpose.

Thank you for considering this submission.

Piers Verstegen

Director