Submission on proposed Environmental Protection Act 1986 amendments – Modernising the Environmental Protection Act

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General comment

Whilst many of the proposed changes are welcome, they are not really a significant change to the EP Act, and if the purpose of these changes are to 'modernise' it, they fall well short of that. The first EP Act was the 1971 Act, which was then significantly re-written in 1986, only 15 years later. It was been 34 years since that second Act came into effect, and much has happened in the environmental protection space since then, which would warrant and significant re-write of the Act.

This is a significant missed opportunity.

This submission addresses areas proposals for change that, I believe, are either problematic or can be further improved. I will only address those matters that I have significant expertise in, and experience with.

Objects of the Act

This is one area of the EP Act which is in urgent need of review. The existing 5 principles are still relevant, but I suggest that the addition of two more is appropriate.

The first relates to the primacy of science and relevant knowledge, especially Tradition Knowledge, as the basis for decision making. In the age of social media, it is too easy for people to ignore good science, and use anecdotal information as the basis for their decision making. It should be a principle of decision making in environmental protection that robust and peer reviewed science has primacy.

Further, given the strong links that Traditional Owners have to Country – i.e. the natural environment – it should be a principle of decision making in environmental protection that Traditional Knowledge is recognised as having equal primacy, or at least a level of importance, to that of science.

The second suggested additional principle is related to climate change. Given the urgent need to address this issue, both in terms of mitigation and adaptation, a principle should be added to the EP Act that puts the need to address this issue as a core consideration for every aspect of environmental protection.

Functions of the Authority

The P Act sets out 18 functions of the EPA, and it is highly likely that the majority of the time spent by the EPA is on the first function – conduct EIA. Whilst this is not a matter for the current amendments to the EP Act, an audit should be done on the effectiveness of the EPA in carrying out and using it resources on these 18 functions. For example, function (n) is "to

establish and develop criteria for the assessment of the extent of environmental change, pollution and environmental harm" which sounds very much like State of the Environment Reporting. The EPA website shows the last of this work was done in 2007. On this issue alone, the EPA is not carrying out fully its statutory functions.

Part III – Environmental Protection Policies

I support the need for a separate review of this section of the EP Act, and look forward to this being a full public review.

Assessment of proposals

It is proposed to add clause 39A. (3) as follows –

> *In making its decision under subsection (1) the Authority may take into account other statutory decision-making processes that can mitigate the potential impacts of the proposal on the environment*

A similar clause is also proposed to be added as 44 (2AA) i.e.

> *In considering key environmental factors and any recommendations that may be included in the assessment report the Authority may take into account other statutory decision-making processes that can mitigate the potential impacts of the proposal on the environment.*

I note that both these clauses are similar to what is contained in the Administrative Procedures, and it is assumed that this would be removed.

Whilst I noted the use of the word 'may', there is danger in the EPA applying this clause. In the first case, the EPA could decide to not assess a proposal because another decision making process could adequately deal with the proposal and ensure that significant environmental impacts would not occur. It is only the EP Act which gives primacy to environmental protection, and decisions made under other Legislation – for example Planning – have to balance a range of issues in making a decision. The Planning and Development Act (2005) has 3 purposes, one of which is "promote the sustainable use and development of land in the State." Clearly, Planning has to balance environmental outcomes with social and economic ones.

The EPA cannot rely on other decision making processes to give primacy to environmental factors, and cannot be certain that environmental impacts won't be significant.

This same argument applies to an EPA assessment – the EPA cannot be certain that another decision making processes can adequately deal with a proposal to ensure that environmental impacts won't be significant.

I understand the reasons for wanting these changes but there are alternatives to these two clauses.

The first would be for the EPA to either not accept a referral or to stop the clock and await the outcome of the other decision making process and assess how that process has dealt with the proposal. If the environmental issues are adequately dealt with then the EPA can not assess the proposal. Alternately, the option is still open for the EPA to assess the proposal should it find the environmental issues are not adequately dealt with.

In the second case, the EPA report could note that another decision making process could deal with a particular factor, but make a recommendation for an environmental condition which could be removed as part of Ministerial discussion undersection 45 where the other responsible Minister agrees to apply an appropriate condition through his/her decision making process for the proposal.

Strategic assessments (SA)

The proposed changes are supported and the arguments in favour of the EPA doing more strategic environmental assessments (SEA) are also supported – there is much written in the academic literature that supports these arguments as well. However, the proposed changes are only minor and will not lead to more SEAs being carried out by the EPA. Section 39B does not change the referral process for SAs, - i.e. an SA can only be carried out if the proponent refers it to the EPA. There is no power for the EPA to call in a strategic proposal for assessment nor for the Minister to refer a strategic proposal to the EPA for assessment. If the Government is serious about wanting to drive a "reform of processes and approaches to the regulation of the environment to promote more efficient practices" (P3) then facilitating more SAs by the EPA would go a long way to achieving this.

There are two options here. The strongest option would be to include a clause under 39B that allows the EPA to call in a strategic proposal that contains proposals that cumulatively would have a significant negative impact on the environment. A softer approach would be to allow the EPA to negotiate with a proponent of a strategic proposal that contains proposals that cumulatively would have a significant negative impact on the environment to have it referred to the EPA. The EPA would give notice that it has identified such a proposal and is seeking a referral. Where this occurs, and the proponent does not make a referral, the proponent would be required to outline how the significant environmental matter are to be addressed, including any later referral tio the EPA.

The second option involves setting up a proper way for the EPA to carry out 'informal' SEAs. The EPA has carried out several informal SEAs of plans, policies and programs using section 16(e) of the EP Act. Many of these have been effective in providing the environmental rules for the implementation of these plans, policies and programs. Section 39B could be amended by adding a clause allowing the EPA to assess a strategic proposal and producing a report to the Minister with advice, but to not have proposed environmental conditions.

I note section 45 is being amended to clarify DMAs – it is possible that under a SA the proponent would also be a DMA – is this a problem?

Schemes

The proposed changes are supported, but one other changes should be considered. The EP Act still requires that all Schemes and Amendments be referred to the EPA. It is time to bring this part of the EP Act in line with proposals – i.e. only those Schemes and Amendments that have could have a significant environmental impact should be referred to the EPA.

Implementation of proposals

I note the reference to the Supreme Court case Conservation Council of WA v the Minister and the changes to the 45(6) to facilitate the Minister negotiating with fellow Ministers to arrive at an approval for a proposal even if the Minister has determined through appeals that a proposal is environmental unacceptable. Two significant issues arise here that should be further addressed.

Assessments under Part IV of the EP Act are thorough, transparent (through a public process), accountable (through appeals) and rigorous (explained in the EPA report). If an environmental assessment ends with a decision that it is environmental unacceptable through this process, then the public can be confident that that decision has significant merit. It is a significant step for the Government to then determine that the proposal should proceed despite it being found environmentally unacceptable.

In the two cases to-date where this has occurred the government simply released a short press statement with little information on the deliberative process that was gone through to arrive at this decision. I suggest that in these cases that the Minister for Environment release a report (not appealable) which sets out the reasons for the decision and how the environmental impacts would be mitigated. Section 45 should be amended to allow for this reporting.

Further, if the Minister is of a mind to approve a proposal found to be environmentally unacceptable he/she should be required to seek further advice from the EPA (not appealable) of how the environmental impacts would be mitigated through environmental conditions.

This process would free up the EPA to not second guess the Ministers decision (and be seen to not second guess the Minister) by not recommending environmental condition in the event that the Minister, in consultation with fellow Ministers, decided to approval and environmental unacceptable proposal. As well, it gives the Minister some 'cover' in going into negotiations with fellow Ministers after finding through appeals a proposal to be environmentally unacceptable.

I note that these changes do not address a case where a proposal is found to be environmentally unacceptable but no appeals are received against the EPA report – is this a problem?

Clearing permit changes

I note and support the proposed changes to Part V to avoid small proposals for clearing to not require a permit (51DA (3) and 51E (4)). However, the EP act does NOT require that the CEO publish reasons for that decision. This would reduce the transparency of decision making under Part V and I recommend that 51E. (10A) have added to it "(c) the reason why a proposal does not need a permit. Further, given the public concern about the cumulative loss of native vegetation, the CEO should be require to provide an annual report of the nature and extent of clearing that has occurred where the CEO determined that a permit was not required.

I note the inclusion of additional types of conditions that can be set under a permit ((51I). Whilst these are supported some additional clarity is need to prevent double counting (a

site can only be used once for covenanting) and that the third part land owner must give approval.

Thank you for the opportunity to provide a submission on these proposed changes. Please do not hesitate to contact me should you require any further clarification on matter raise here.

Sincerely

Dr Garry Middle