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Modernising the Environmental Protection Act (EP Act)

Thank you for the opportunity to comment on the reform of the Environmental Protection Act 1986.

The EP Act does indeed need modernising, and this review is welcomed. Many of the Government's proposed amendments to the EP Act have merit although they must be focussed to ensure that environmental concerns take precedence over efficiency and other goals. I will not go over every relevant point in this submission in detail – others have covered the same ground using evidence-based analysis, and I endorse their work. In particular, I am aware of the Beeliar Professors' submission and support their recommendations. Eddy Wajon's submission to the review also has numerous detailed and valid points which should be considered. I will reiterate some of their main points that are of particular relevance to my portfolios and experience as an MLC.

Like the Beeliar Professors and Eddy Wajon, I would like to see the primary aim of any changes to the legislation to be more clearly framed around environmental protection, rather than simply efficiencies and transparency, although these are of course important. As the Beeliar Professors argue in their Reform of WA's EP Act Position Paper, *'the exercise of powers under the Act should always be consistent with the Act's object, which is to protect and preserve the environment of the State'.* The objects of the Act are fundamentally based on the principles of ecologically sustainable development (ESD), with regard to ' the precautionary principle; the principle of intergenerational equity; the principle of biological diversity and ecological integrity; principles relating to improved valuation, pricing and incentive mechanisms; and the principle of waste minimisation', as stated in Section 4A.

The problem, as the Professors describe it, is that the operative scheme of the Act is not effectively connected to the Act's objects and principles. Despite its stated basis in ESD

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principles, the application of the Act does not lead to satisfactory environmental protection as it stands. I have observed the negative impacts of this in my work on many proposals in which environmental approval is required - it is very frustrating and of great concern to the members of the public who contact my office. This reform offers a perfect opportunity to address this disconnect.

The Beeliar Professors' proposed changes are excellent. They suggest that decisions made under Parts III and IV should be required to give effect to the Act's objects and principles, particularly in relation to:

- The Act's provisions regarding the content of Environmental Protection Policies;
- Decisions made in relation to Environmental Impact Assessment (EIA) (namely, procedural decisions as to whether and at what level to undertake EIA; the content of the EPA's reports; and the final Ministerial decision on proposal implementation); and
- Decisions made under the provisions for environmental regulation (for example, works approvals, licences and clearing permits).

Other recommendations
I will touch on a number of points that my own experience in analysing proposals and working with constituents that clearly need to be addressed. This is not an exhaustive list.

The Hon. Stephen Dawson MLC, Minister for Environment, notes the need to **reform clearing provisions**, and accredit environmental practitioners so that they can certify documents prior to their submission[1]. While clearing provisions do require reform, the goal of achieving more 'efficient, targeted, flexible and transparent' outcomes should be secondary to protecting flora and fauna.

Similarly, **accreditation of environmental practitioners** should be undertaken primarily to improve environmental protection rather than to improve efficiency, although I have no objections if both can be achieved. I have seen poor quality environmental reviews that had obvious errors, and required the EPA to follow up in an attempt to obtain accurate information. In one case, the updated information was not easily available to the public since it had not been updated on the EPA's website. This lack of rigour and transparency can undermine both the EPA's decision-making processes and public confidence in them.

Furthermore, the environmental consultants undertaking environmental reviews are of course paid by the proponents, which compromises their independence and undermines the credibility of environmental reviews presented to the EPA. Conflicts of interest can easily arise. One way of overcoming this problem in relation to information presented for Environmental Impact Assessments, would be to adopt the use of **independent peer review**, which is common practice in scientific research. This would of course require adequate government funding.

[1] Hon Stephen Dawson MLC, Minister for Environment, *Feedback sought on improving environmental legislation.* Media Release. Monday, 28 October 2019.

Proposed **bilateral agreements with the Commonwealth** could be problematic since WA's EPA is not experienced in the application of the EPBC Act. The state body is also typically less familiar with environmental issues of national concern than its federal counterpart. Unless these concerns are satisfactorily addressed, and the full impact of the proposed changes clarified, the Commonwealth should retain the power to assess projects separately. I note that in a recent instance the EPA portal was used to collect data for the EPBC, which was then handed over to the federal body for assessment. This seems to be an effective approach – time will tell.

The **EPA should assess all proposals**, even where another agency is responsible for their regulation. The EPA has better capacity and institutional knowledge of environmental assessments and approvals than other agencies. Furthermore, Section **48A environmental reviews** should undergo public review, and the Department of Water and Environmental Regulation (DWER) should help to oversee implementation of any environmental conditions associated with planning proposals. The EPA should be adequately resourced to enable its auditing and compliance branch to operate effectively and ensure that environmental conditions are met.

The Beeliar Professors raise another key point that I have been dismayed to observe in practice. Implementation conditions need to be clearer and more effective. At the moment, proponents can meet procedural requirements such as the preparation of management plans, but this does not guarantee an outcome that would actually be acceptable to the public, such as avoiding the loss of populations of specified fauna. We need to know whether a management plan has actually been effective in protecting species, not just that it was created. As the Beeliar Professors argue: 'Wherever possible, the EPA should impose objectively verifiable conditions…that can be monitored with measurable outcomes…'. Box-ticking compliance without verifiable outcomes is no longer acceptable.

I agree that the public EIA process should include such measurable outcomes, so that they can be analysed fully and publicly. It is not good enough to say that "offsets will be used" or "a management plan will be developed" at a later stage. The public must be able to fully scrutinise all aspects of a proposal that are likely to impact the environment. Leaving subsidiary management plans to be assessed by the OEPA effectively delegates the EIA to the OEPA rather than subjecting it to full and transparent public scrutiny. Offsets should only be used under particular circumstances, and should be transparently evaluated prior to acceptance. At the moment, it is too easy to resort to the use of offsets and achieve no net environmental benefit, or worse, negative environmental benefit.

There should be a requirement to consider **climate change** mitigation, including greenhouse gas emissions reduction and sequestration, as well as adaptation, throughout the administration of the Act.

Animal welfare should also feature more prominently in the intent and application of the Act. A new provision should be included in the Act. This is advisable since many of the decisions the EPA makes impact directly on the welfare of native and non-native animals. As the Beeliar Professors explain, the Act currently focuses on extinction or loss of species, and does not refer to any 'duty of care'. This gap should be rectified.

Inadequate analysis and integration of **cumulative impacts** is a major problem. I have witnessed this in staged proposals from a single proponent in which the environmental impact of each stage is assessed but the cumulative impact of the broader project is not, or at least not adequately. For instance, I have seen cases in which the environmental effects of each stage are not considered serious enough to warrant major assessment, but the cumulative impact of all stages may be serious. It would be a relatively simple matter for a proponent to carve a proposal up into stages in such a way as to avoid major environmental assessment. Cumulative impact assessments must also be undertaken more effectively where multiple proposals are submitted by different proponents.

Furthermore, as the recent, very public tension around the EPA's proposed greenhouse gas offsets provisions shows, there is a need to amend the Act to ensure that the Government cannot instruct or influence the EPA to change its recommendations or decisions. The Act should make it much clearer that the Government is not permitted to influence the EPA to amend its reports prior to publication. Another important step to ensuring that the EPA's decisions are independent and trusted is to ensure that the people appointed to the EPA board are suitably qualified, experienced and independent. The Act could include eligibility criteria for the appointment of Board members, developed through a deliberative, collaborative process involving experts, stakeholders and the public.

There is also an urgent the need to reintroduce regular **State of the Environment (SoE) reporting** and this should be legislated. As I have verified through Parliamentary Questions, unlike other jurisdictions, WA has no legislative requirement for SoE reporting. Our last SoE report was published in 2007. Although the Government responded to my questions about SoE reporting by indicating the data collection and reporting in the EPA's annual reports and Biodiversity Audits, these do not offer the same strategic value as an SoE, with the result that the Government's capacity to track and manage the state's environment is limited, as is its ability to participate in a national approach to environmental protection and restoration. A new section 21A should be added to the EP Act requiring regular and robust environmental reporting, publication of the reports and a timely and clearly justified response from the Minister for Environment.

The Beeliar Professors' list of weaknesses in the **EIA process** resonate strongly with my experience assisting members of the public. Constituents regularly complain about one or more of these weaknesses in relation to a range of proposals. This indicates a systemic problem. The issues include:

- Shortfalls in the independence of the EIA process;
- Deficiencies in the assessment of planning schemes and subdivision proposals, consequent on the 1996 amendments;
- The problem of cumulative impacts;
- Problems with the approval process;
- Lack of clarity regarding implementation conditions;
- Failure to define significance in the body of the EP Act;
- The problematic use of offsets to counteract significant residual impacts; and
- Inadequate resources for the OEPA.

In response to the cases brought to my attention, many constituents and stakeholders also argue for improved and additional mechanisms for members of the community to be able to initiate **third party appeals** in relation to environmental decisions, and enforcement proceedings for environmental offences. This should be considered. The Beeliar Professors recommend that

> an amendment modelled on section 475 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) be adopted. The amendment would allow a person, or a person acting on behalf of an unincorporated organisation, to apply to the Supreme Court for an injunction if a proponent engages or proposes to engage in conduct that constitutes an offence or other contravention of the EP Act or the regulations and conditions made under it.

Furthermore, Section 46 of the EP Act should be amended to permit the Minister to revoke approvals on the basis of new evidence of environmental harm. This is essential in this time of climate and environmental crisis in which rapid change is likely to become the norm. Any amendments of significant implementation conditions should also be assessed with at least the same level of public and EPA scrutiny as the original proposal. The Beeliar Professors' discussion paper elaborates on this.

Related Bills

Current reforms of the EP Act do not address issues with **environmental appeals**, despite calls from many Western Australians for third-party appeal rights reform, including conservation groups, the National Environmental Law Association and the Law Society. The appeals system needs to change - WA is the only state with an environmental appeals system in which appeals are not decided by a specialist independent tribunal or court. As I have noted previously, development proposals currently pass through a convoluted and non-transparent bureaucratic process, which ends in the Minister determining the appeal – the same person in charge of making final decisions about these approvals.

The failures and limitations of the current appeals system indicate the need for an **Environment Court** as detailed in my **Environment Court Bill 2019**. The Environment Court would be a new, independent and specialist body that acts as both a merits appeal tribunal and a court for judicial review applications under existing environmental legislation. Public interest would be of fundamental importance to the Environment Court, something that is not a requirement in the current environmental appeals system.

If this legislation is not introduced in the short term, the Government could consider allowing appeals to be referred to the SAT, until more robust legislation is developed

The **Rights of Nature and Future Generations Bill 2019** that I introduced into Parliament last year can further strengthen environmental protection and recognise First Nations people's special rights and responsibility to country, with a unique role considered in respect to those rights. Under the Bill, strong penalties for significant violations would reflect the importance of the rights of nature, with corporations to potentially receive fines as high as $5 million and its directors able to be held personally liable for those same offences. Individuals found to have significantly interfered with the rights of nature and future generations could be penalised through fines of up to $500,000 and/or five years in prison. This represents a basic application of the polluter-pays principle, making those who profit from environmental harm

accountable for the costs to the community and nature. This Bill could play an important role in complementing and supporting the EP Act.

Greens (WA) principles and measures

Finally, the Greens (WA) suggest a number of principles and measures that that should be considered when amending the EP Act[2], including the following:

- prohibit mining, clearing and land development in conservation reserves and in environmentally sensitive areas;
- protect wetlands and ground water dependent ecosystems;
- strengthen clearing regulations, and improve monitoring of illegal clearing and breaches of conditions under the Environmental Protection Act and take legal action with effective penalties where appropriate; this could include a requirement for revegetation, rather than a fine or warning letter which do not appear to be adequate deterrents;
    - Eddy Wajon and the Beeliar Professors concur that a Schedule 5 to the EP Act should be amended to provide for Clearing Principles written as duties that flow from; '**native vegetation should only be cleared if'**, rather than the present wording that 'native vegetation should not be cleared if'.
- prohibit clearing in local government areas with less than 30% native vegetation remaining and prohibit further clearing of vegetation types that are found to be at less than 10% of their pre-European settlement extent;
- conserve remaining natural habitat for native animals;
- require all emitting industries to implement air pollution Management Plans which have been approved by a peer review process and the Environmental Protection Agency (EPA), through enforced licence conditions;
- protect our most important natural and cultural heritage from any large-scale disturbances, such as mining;
- specific mining amendments to the Environmental Protection Act 1986 (WA) are required to ensure that the environment affected by mining is subject to State standards and objectives;
- environmental and heritage assessments related to mining and other operations should be treated seriously by responsible Ministers, and public concerns and appeals taken into proper account;
- the Agencies responsible for environmental assessment, advice, approvals and compliance should be open, transparent and accountable; Decisions should be justified and reported in detail.
- members of bodies assessing the environmental or heritage merit of a proposal must be free of relevant vested interests;
- more effective environmental regulation for the resources industries is needed, with significant deterrents for non-compliance with legislation, regulations and licence conditions;

[2] https://greens.org.au/wa/policies/biodiversity; https://greens.org.au/wa/policies/animals; https://greens.org.au/wa/policies/mining-fossil-fuels

- the quality, thoroughness and transparency of environmental impact assessments should be improved.

I congratulate the Government for undertaking this much-needed legislative review and encourage the Government to incorporate the recommendations of experts such as the Beeliar Professors.

Yours sincerely,

Hon Diane Evers MLC

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