

the BEELIAR GROUP

Professors for Environmental Responsibility

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EP Act Discussion Paper
Department of Water and Environmental Regulation
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By Email: EPActamendments@dwer.wa.gov.au

Modernising the Environmental Protection Act; Discussion Paper

We are writing to you on behalf of the Beeliar Group of Professors for Environmental Responsibility. Our group of 35 Professors was formed in January 2017 out of concern over the process used to plan and implement the Perth Freight Link and Roe Highway Stage 8.

We are pleased to see that the Government has decided to modernise the Environmental Protection Act as it has many deficiencies, which have been noted by various commentators since its enactment in 1986, and with few of these having been addressed.

The Discussion Paper and Draft Bill contain several useful amendments and we agree with most of them, except where noted below.

1. Bilateral agreements with the Commonwealth

We have concerns about the delegation of Commonwealth powers to carry out assessments under the EPBC Act to the States as history shows that the States sometimes overlook key factors of national importance. The effect of the proposed amendments is unclear, and we strongly recommend retention of the current arrangements where the Commonwealth has the power to separately assess projects. Two independent assessments can be of greater value than one alone.

2. Certification of Environmental Practitioners

The environmental consulting industry reports to and can influence proponents. This is beneficial but can affect scientific objectivity in the environmental reviews it carries out. This is understandable because the consultants are hired and paid for by the proponents. Documents should be certified by independent auditors and/or peer reviewed by independent scientists, both explicitly acting free from conflict of interest, to ensure they are both fit for purpose and consistent with best practice.

3. Referral of proposals

We have serious concerns about not assessing proposals where other government agencies have the power to regulate them. Fundamentally these other agencies do not operate under legislation with environmental protection as an object. We mention in particular the Mines Department, the Planning Department and Main Roads in this regard. We believe that the EPA should assess all proposals that have the potential to significantly affect the environment. In particular we consider

that Environmental Reviews carried out under section 48A are subjected to public review and that DWER should have a role in overseeing the implementation of environmental conditions applied to planning proposals.

Many of the items listed in Section 3 of the Discussion Paper as *Further Issues for Consideration* are very important as they address key deficiencies in the current legislation. We have previously submitted a detailed position paper that covers many of these suggestions. An amended copy is attached to this submission.

Specific comments on *Further Issues for Consideration* are listed below.

1. New Ideas: These all sound reasonable
2. Delegations: We agree with this proposal
3. Role of the EPA: The first two dot points are covered in detail in our position paper. We do not support the third dot point as culture and heritage are often closely linked to the environment. See recommendations 1,4 and 5 our position paper.
4. Environmental Protection Policies: The first two dot points are covered in detail in our position paper (recommendation 7) and we strongly support them. We also support the third dot point as we are concerned that Part III is not being used as widely as it could be or as widely as was intended when the Act was first drafted.
5. Assessment: We agree with all of these proposals; they are covered in detail in our position paper. See recommendations 6, 8, 9, 10 and 13. This is an area requiring urgent attention. In particular, section 48 requires rewriting to cover the legal issues raised by the recent assessment of the Maddington Kenwick Strategic Employment Area.
6. Decision-making: We agree with all of these proposals and most of them are covered in our position paper. See recommendations 1, 11, 12.
7. Offsets: We strongly agree with this proposal and it should be combined with amendments to the Act to require the EPA to follow its own policies and guidelines. See recommendation 14 in our position paper.
8. Clearing of Native Vegetation: We support these suggestions but would prefer the second dot point to the first. This is a crucial issue for sustainability and it deserves its own Act. In the interim the Clearing Principles should be 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'. See recommendation 18.
9. Industry regulation: We agree with this suggestion.
10. Compliance and Enforcement: We support all of these amendments, they are covered in our position paper. See recommendations 15 and 16. These amendments are urgent as the EPA currently lacks the resources to ensure compliance with Ministerial Conditions. This undermines public support for the EPA and DWER and leads to the perception that we have poor standards of environmental protection. The post-assessment follow-up is just as important as the initial assessment, but it is currently under resourced and ineffective.
11. Appeals: We agree with both of these suggestions. We have a detailed section on appeals in our position paper (recommendation 17). We would like to see an independent appeals process, rather than the current Ministerial model which we regard as flawed and outdated. We believe it is time to establish an environmental tribunal or court to assess appeals, as exists in most other States at present, or at the very least to provide for referral to the State Administrative Tribunal.

Additional Issues

In our attached submission, we raise three additional issues:

- i. The need to amend the EP Act to include a requirement for greenhouse gas emissions and climate change to be considered throughout the administration of the Act. See recommendation 2
- ii. A new provision be added to the Act requiring the EPA and DWER to ensure that all practicable measures are taken to prevent the injury, pain and distress of animals whose well-being falls under areas currently subject to their oversight. See recommendation 3.
- iii. There is a need for WA to contribute to regular State of the Environment reporting as is done in all other States and the Commonwealth. See recommendations 19 and 20. This will require an amendment to section 21 of the Environmental Protection Act.

Thank you for giving us the opportunity to comment on this important and timely review of the EP Act. As stated above, we believe that the Act is in urgent need of modernisation and we hope that you will carry out a comprehensive set of amendments as outlined above.

Yours sincerely,

Philip Jennings, Patricia Harris, John Bailey

On behalf of the Beeliar Group

PROPOSALS FOR THE REFORM OF WESTERN AUSTRALIA'S *ENVIRONMENTAL PROTECTION ACT 1986*: A POSITION PAPER

Prepared by Philip Jennings, John Bailey and Patricia Harris for the Beeliar Group: Professors for Environmental Responsibility.

EXECUTIVE SUMMARY

This position paper offers a series of recommendations designed to strengthen Western Australia's *Environmental Protection Act 1986* (EP Act). It aims to identify key areas where legislative amendment is required and to make specific recommendations for reform that should improve decision-making under the Act and better apply the principles of ecologically sustainable development into all aspects of the Act's administration and enforcement. In particular, the paper notes that 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.

OUR RECOMMENDATIONS AT A GLANCE

Validating and extending the objects and principles of the Act

1. 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.
2. The object of the Act be extended in scope to explicitly include a requirement for greenhouse gas emissions and climate change to be considered throughout the administration of the Act;
3. A new provision be added to the Act requiring the EPA and DWER to ensure that all practicable measures are taken to prevent the death, injury, pain and distress of animals whose well-being falls under areas currently subject to their consideration.

Strengthening the independence and functioning of the Environmental Protection Authority (EPA)

4. A new subsection be added to section 4A of the EP Act, which (a) obliges the EPA 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 (b) ensures that these published policies are mandatory considerations.
5. Section 7 of the EP Act be amended to prevent politicisation of the Board of the EPA. This should occur through the inclusion of a set of eligibility criteria for the appointment of Board members as a schedule to the Act. These criteria should be developed following public and professional consultation.
6. Section 44(3) should be amended to make it clear that the government may not request or direct the EPA to alter the content of any of its reports prior to publication.

Protecting key Environmental Protection Policies (EPPs)

7. 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 (EPP). Parliamentary approval should also be required to validate the Minister's decision as in the case for any new EPP.

Strengthening Environmental Impact Assessment (EIA)

8. A confidential peer review process, similar to the process used for academic publications, be introduced to assess the Environmental Review documents prepared by proponents. Such a process should be mandated by the EP Act and funded accordingly.
9. A complete public review of section 48 of the EP Act and that the regulations are amended to require the EPA to seek public comment on the content of Environmental Reviews done for planning proposals.
10. Section 38A of the EP Act to be amended to make it mandatory for the EPA to explicitly consider and report on the possible cumulative impacts of every proposal it receives.
11. Section 46 of the EP Act be amended to (a) allow the Minister to revoke an environmental approval if and/or when new evidence about the potential of significant environmental harm becomes available, and (b) require that any amendment of significant implementation conditions be assessed by the EPA at the same level of public consultation as occurred when the original proposal was assessed.
12. 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.
13. The EP Act be amended so that the criteria for determining significance are contained in the body of the Act rather than within the separate administrative procedures.
14. The EPA's policies and guidelines be amended to limit the use of offsets and make explicit the circumstances under which they can be applied.
15. The funding arrangements for the EPA be reviewed to ensure that the auditing and compliance branch is able to carry out its functions effectively-

Rectifying weaknesses in the monitoring and appeals processes currently associated with the EP Act

16. The EP Act be amended to 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.
17. WA establish a specialised environmental court or tribunal, to deal with merits-based environmental decisions and related appeals.
18. Schedule 5 to the EP Act be amended to provide for Clearing Principles written as duties that flow from the axiom that 'native vegetation should only be cleared if absolutely necessary and if', rather than the present framing which states that 'native vegetation should not be cleared if'. The Act should also be amended to prohibit clearing that is seriously at variance with the Clearing Principles

Developing a legislative basis for State of the Environment Reporting

19. A new section 21A be added to the EP Act: to impose a duty for regular State of the Environment (SoE) reporting on the EPA; to specify the required content of SoE reports; and to ensure the tabling of reports in Parliament accompanied by a Ministerial response in a timely manner.
20. To ensure appropriate governmental involvement in SoE reporting, we propose two solutions, one more extensive than the other. The first, lesser option would require government departments and agencies to prepare and lodge their environmental action plans with the EPA, and report annually upon their progress in implementing these plans under specified timelines.

The second more extensive option is modelled upon WA's *Financial Management Act 2006* and could be achieved either through amendments to the EP Act or a special purpose Act.

We now explain our recommendations in detail, which, as indicated, fall into the following groups:

- ⇒ Validating the objects and principles of the EP Act;
- ⇒ Strengthening the independence and functioning of the EPA;
- ⇒ Protecting key Environmental Protection Policies;
- ⇒ Strengthening Environmental Impact Assessment;
- ⇒ Rectifying weaknesses in the monitoring and appeals processes associated with the EP Act; and
- ⇒ Developing a legislative basis for State of the Environment Reporting.

VALIDATING THE OBJECTS AND PRINCIPLES OF THE EP ACT

Like many environmental statutes, the EP Act ties its objects to the principles of ecologically sustainable development. Section 4A states that the object of the Act is to 'protect the environment of the State', having 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'.

The difficulty is that the Act's object and principles are largely disconnected from the operative scheme of the Act; that is, from Part III – Environmental protection policies; Part IV – Environmental impact assessment; and Part V – Environmental regulation. This deficiency could be remedied by requiring the provisions and decisions made under Parts III to V to give effect to the Act's object and principles. In particular, we have in mind that:

- ⇒ 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).
- ⇒ All have legal force.

Recommendation 1: We recommend that the EP Act be amended to require decisions made under Parts III, IV and V to give effect to the object and principles as contained in section 4A are legally binding.

We argue further that if the object of the Act is to be met, two additional matters require explicit consideration

- (a) greenhouse gas emissions and climate change, and
- (b) the welfare of animals.

(a) Greenhouse gas emissions and climate change

For Western Australia, the reality of climate change includes hotter temperatures, more severe droughts and bushfire seasons, and loss of unique animal and plant species. The State also has a substantial capacity for transition to a low carbon economy, given its ready access to renewable energy sources such as sun, wind, wave. Despite this, its greenhouse gas emissions have continued to increase significantly since 2005, while emissions in New South Wales, Victoria, Queensland, and South Australia have fallen since 2005. In positive terms, and in line with all other States and Territories, Western Australia has a commitment to zero net omissions by 2050. In these circumstances, climate change and emissions need to be an explicit consideration embedded in the core of the EP Act.

Recommendation 2: We recommend that the object of the Act be extended in scope to explicitly include a requirement for greenhouse gas emissions and climate change to be considered throughout the administration of the Act .

(b) The welfare of animals

The EPA often makes decisions that affect animal welfare and it needs to have clear guidelines on how to address this important issue. Hence, we argue that a new provision be added to the Act requiring that EPA and DWER to ensure that all practicable measures are taken to prevent the death, injury, pain and distress of animals whose well-being falls under areas subject to EPA's consideration under the Act. Our rationale is set out in more detail below:

- That humans have an obligation to living animals is a well-established legal and community principle. Trauma and suffering can occur for numerous reasons potentially falling under the auspices of the EPA and the DWER — consider, for example, the controversy over the culling of kangaroos at Thomson's Lake. This is not currently explicitly recognised under the EP Act and the protection of animals from death, injury, pain and distress, consequently falls under the environmental radar.
- All living animals have the capacity to suffer injury and sentient animals also have the capacity to experience pain. This may occur for numerous environmental reasons, including loss of habitat (e.g. from land-clearing, fire and drought), pollution, and removal of individual animals (native and non-native) from protected areas.
- At present, the obligation to protect animals from harm and suffering is not reflected in the EP Act, except in so far as the protection of species from extinction or loss constitutes part of environmental protection. We note that the Act defines 'protection' as 'including conservation, preservation, enhancement and management thereof'. This is a limited formulation since it does not incorporate the 'duty of care' for the welfare of animals commonly associated with protective legislation.
- All living animals potentially fall within the auspices of the EP Act, since it defines the 'environment' as 'living things, their physical, biological and social surroundings, and interactions between all of these' (thus including all living animals and not just endangered species). It is open to interpretation as to whether 'living things' includes individual living things or only populations of living things. We recommend that the definition should apply to both individuals and populations. This would require clear wording to that effect.
- The provisions in the EP Act relating to 'environmental harm' should also be applied to animal welfare matters. This may require explicit provision through the use of Section 3A(2)(d)

‘alteration of the environment of a prescribed kind’. A threshold may be required here above which the environmental harm provisions would apply.

Recommendation 3: We recommend that Section 15 of the EP Act be amended as follows:

Objectives of Authority

It is the objective of the Authority to use its best endeavours —

- a. to protect the environment;
- b. to prevent, control and abate pollution and environmental harm; and
- c. to protect native animals from harm and to manage feral animals humanely.

STRENGTHENING THE ENVIRONMENTAL PROTECTION AUTHORITY

Our recommendations address the following two issues:

- a) Lack of certainty concerning the legal status of the EPA's policies and guidelines;
- b) Political influence over EPA decisions.

a. *Lack of certainty concerning the legal status of the EPA's policies and guidelines*

The EPA has, over the years, developed a substantial body of policies, guidelines, and other materials to guide itself in performing its statutory functions (see section 16 of the Act) and exercising its statutory powers (see section 17 of the Act, among others). These materials provide guidance to proponents, the community, and other stakeholders about, among other things, environmental impact assessment. Although the community may reasonably expect the EPA to act in a manner that is consistent with the policies and guidelines that the EPA itself has developed, these materials are not generally binding upon the decision-making of the Board.

In *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126, the Court of Appeal determined that the three policy documents the EPA had developed in relation to environmental offsets were simply ‘permissive relevant considerations’ rather than ‘mandatory relevant considerations’. The EPA’s *Legal and Governance Review*, published in May 2016, subsequent to the decision of the Chief Justice in *Save Beeliar Wetlands (Inc) v Jacob* [2015] WASC 482, but prior to the Court of Appeal decision, emphasised that ‘the Review was not merely to advise the EPA on making *lawful* administrative decisions but also how to reform its policy suite so as to ensure it can make *good* administrative decisions’ (pp. iv-v; original emphasis). In elaboration, the Review stated that:

It remains as a matter of good governance and administration, that the EPA should take into account its published policies. That is, there is little point in the EPA preparing and publishing policies in relation to its statutory functions, unless those policies are actually used in the course of the EPA’s work. (p.12) ¹

¹ Environmental Protection Authority, *Legal and Governance Review*, May 2016, <<http://www.epa.wa.gov.au/legal-and-governance-review>>.

As Toby Nisbet and Geoffrey Syme point out, any governmental failure to follow published policies ‘erodes confidence and trust in the system’.² Affirming this insight, we submit that it is clearly counterproductive for the EPA to develop a raft of instruments ranging from policies and guidelines to position statements and assessment frameworks if the EPA need not put these provisions into effect in its decisions on referred proposals.

Recommendation 4: We recommend that a new subsection be added to section 4A of the EP Act, which (a) obliges the EPA 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 (b) ensures that these published policies are mandatory considerations.

b. Political influence over EPA decisions

Part II of the EP Act reflects the intent of Parliament that the Board be both independent of government and competent in performing its functions. Under the EP Act, the EPA consists of 5 members appointed by the Governor on the recommendation of the Minister on account of ‘their interest in, and experience of, matters affecting the environment generally’ (ss. 7(2)). The Act also states that neither the Authority, nor the Chairperson, ‘shall be subject to the direction of the Minister’ (ss. 7(8)). Over the period of the Barnett Government, community groups expressed considerable concern about the political influence exercised over the EPA through the appointment of politically aligned members lacking environmental credentials and having pro-development leanings.

The effect of non-meritorious appointments and repeated failures by the Board to recognise conflicts of interests undermines public and investor confidence in EIA processes under the Act and is fundamentally unacceptable to the rule of law in this State. By way of example, the then Minister for Environment, the Honourable Albert Jacob, tabled a paper in the Legislative Assembly in support of the *Environmental Protection Amendment (Validation) Bill 2014* that listed 25 environmental impact assessments by the EPA that had been identified as being exposed to a significant risk of challenge in the wake of the Supreme Court’s 2013 decision regarding the validity of environmental approvals for the Browse LNG precinct. As the Minister pointed out, those cases involved large mining projects where very large sums of money have been invested in the state.

The critical point is that the Board should be composed of members with a recognised knowledge of environmental issues and a demonstrated commitment to the EP Act’s objects and principles. How to achieve this is a compelling and difficult issue, calling for informed, open public discussions. One possibility would be to follow the model of appointing judges to the Supreme Court of WA, whereby, acting on the advice of the legal profession, the Governor appoints ‘suitably qualified’ persons, who must be practising lawyers with a minimum of 8 years’ experience (sections 7 and 8A *Supreme Court Act 1935*). In the case of appointment to the EPA, and in the absence of a body equivalent to that which represents the legal profession, we suggest that eligibility criteria for the appointment of

² T. Nisbet and G. Syme, ‘No way to build a highway: law, social justice research and the Beeliar wetlands’, *Environmental Planning and Law Journal*, vol. 34, no. 2, 2017, p. 175.

Board members be developed and included as a schedule to the Act. These criteria should be developed and published following public and professional consultation.

Recommendation 5: We recommend that section 7 of the EP Act is amended to prevent politicisation of the Board of the EPA. We propose that this should occur through the inclusion of a set of eligibility criteria for the appointment of Board members as a schedule to the Act. These criteria should be developed following public and professional consultation.

We also note that political influence could be exercised through the checking and editing of EPA reports by the government, prior to publication. Under the provisions of s44(3j), an EPA report is delivered to the Minister for perusal prior to its publication. There is, however, no statement to the effect that the government may not request or direct the EPA to alter the content of its report prior to publication.

Recommendation 6: We recommend that section 44(3) be amended to make it clear that the government may not request or direct the EPA to alter the content any of its reports prior to publication.

PROTECTING KEY ENVIRONMENTAL PROTECTION POLICIES

Part III of the EP Act provides for the EPA to draft Environmental Protection Policies (EPPs) for consideration and approval by the Minister. Once approved, EPPs are laid before Parliament, and have the force of law. However, there is no legislative requirement for public input if the Minister decides to revoke an EPP. The significance of this policy shortfall is illustrated by the fact that the framework of policies that protect the state's wetlands has been weakened. In 2015, the WA Minister for the Environment revoked two key wetland conservation measures: *The Swan Coastal Plain Lakes Environmental Protection Policy* and the *South West Agricultural Zone Wetlands Environmental Protection Policy*. He did so on the basis that the clearing regulations and environmental harm provisions of the Environmental Protection Act covered all of the issues affecting wetlands and that the EPPs were therefore redundant. Against this, conservationists pointed out that the EPPs served to pre-empt developments affecting wetlands and to alert developers to their inherent value. These EPPs also contained more comprehensive pro-active and positive provisions than the direct regulations noted above.

Recommendation 7: We recommend that 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 EPP. Parliamentary approval should also be required to validate the Minister's decision as in the case of any new EPP.

STRENGTHENING ENVIRONMENTAL IMPACT ASSESSMENT

Our recommendations aim to rectify the following weaknesses in the **EIA process**:

- a) Shortfalls in the independence of the EIA process;
- b) Deficiencies in the assessment of planning schemes and subdivision proposals, consequent on the 1996 amendments;

- c) The problem of cumulative impacts
- d) Problems with the approval process;
- e) Lack of clarity regarding implementation conditions;
- f) Failure to define significance in the body of the EP Act;
- g) The problematic use of offsets to counteract significant residual impacts; and
- h) Inadequate resources for the OEPA.

a. Shortfalls in the independence of the EIA process

Under Part IV of the EP Act, the proponent [s.40(2)(b)] or responsible authority [s.48C(1)(a)] undertakes the Environmental Review (ER) associated with the EIA process. This is standard practice in other jurisdictions and has the advantage that the proponent or responsible authority can vary their planning as a result of the ER and design their management plan accordingly. Among other things, this process means that environmental consultants have contractual commitments to the proponents. The reliance of environmental consultants on proponents and responsible authorities (for example, state government departments and local governments) for on-going work can support the impression of conflicts of interest in some circumstances. It can also lead, in some cases, to situations in which proponents minimise the significance of environmental impacts and/or otherwise present misleading or misinformation. While this risk may be mitigated by the degree of scientific detail required by the EPA's initial instructions to the proponent/responsible authority, we maintain that the process remains inherently subject to bias and requires independent review. Canada has an

Recommendation 8: We recommend that a confidential peer review process, similar to the process used for academic publications, be introduced to assess Environmental Review documents prepared by proponents. Such a process should be mandated by the EP Act and funded accordingly.

arrangement for funding the review of their Environmental Impact Statements.

b. Deficiencies in the assessment of planning schemes and subdivision proposals

The 1996 amendments to the EP Act (Part IV Division 3 and 4, ss.48A-48J) were introduced in conjunction with the *Planning Legislation Amendment Act 1996*. In effect, these amendments separate 'schemes' (state, regional and local) from the prior category of 'proposals' (Part IV, Division 1 of the EP Act). In many instances, these provisions restrict the power of the EPA to assess and review schemes and/or impose time limits that are unreasonable in the case of complex planning schemes. Sections 48C(6)(b) and 48D (1), for example, give precedence to the relevant scheme Act in the timing and procedure of a public review; while s.48I allows the responsible authority to decide whether or not the issues raised in a proposal under an assessed scheme have or have not been previously assessed.

Under current regulations, the OEPA can draw up an Environmental Review for planning schemes and rezoning proposals without the benefit of public input, with public review being handled by the Western Australian Planning Commission (WAPC) as part of the Metropolitan Region Scheme (MRS) Amendment process. We submit that the WAPC is not qualified to undertake EIA, and that planning

Recommendation 9: We recommend a complete public review of section 48 of the EP Act and that the regulations are amended so as to require the EPA to seek public comment on the content of Environmental Reviews done for planning proposals.

schemes and rezoning proposals should therefore be publicly assessed by the EPA.

c. The problem of cumulative impacts

Although the EPA has powers under section 38A to deal with the cumulative effects of staged or related developments it does not always use these powers effectively. It is common for Government agencies such as the WAPC to split large development projects into a number of stages with each stage having only a minor additional environmental impact while the total project has a major impact. In such cases, the EPA may fail to assess the cumulative impact by only focussing on each stage as it occurs (as illustrated, for example, by the Bollard Bulrush Swamp urbanisation, the Jervoise Bay harbours and the Maddington Kenwick Strategic Employment Area). In industrial areas, such as Kwinana and Collie, where a series of unrelated projects are undertaken by different proponents, the cumulative impact on the ecology and biodiversity of the region may also be unacceptable. By failing to address this possibility, the EPA often requests only a low level of assessment for each of the projects/stages and so the overall project does not receive the level of assessment it requires.

We suggest three possible remedies for this problem. The first is to make it explicit that the EPA must consider possible cumulative impacts every time it assesses a project by specifically asking the proponent at the scoping stage whether the project is part of a staged or wider development. The second is to require the EPA to consider the cumulative impacts of the proposal under assessment together with unrelated current proposals and reasonably foreseeable other developments. The third is to reform the appeals procedures to enable the public to appeal to an independent authority if the EPA fails to properly address cumulative impacts. This is discussed further in a subsequent section.

Recommendation 10: Section 38A of the EP Act to be amended to make it mandatory for the EPA to explicitly consider and report on the possible cumulative impacts of every proposal it receives.

d. Problems with the approval process

We point to two related problems with the current approval process.

- ⇒ First, once a decision has been made, pursuant to section 45, that a proposal may be implemented, the EP Act does not provide an express power for the Minister to revoke the approval, even if new evidence suggesting significant environmental harm comes to light.
- ⇒ Second, while section 45C (2) prohibits the Minister approving changes to a proposal if the change or 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, it is a matter of Ministerial discretion as to whether or not to seek advice from the EPA regarding the significance of the proposed changes to conditions. [Section 46 states that the Minister may request the EPA to initiate an inquiry into any proposed changes to the implementation conditions but does not require that he or she do so; further, section 46(1) does not clearly

Recommendation 11: We recommend that section 46 of the EP Act be amended to (a) allow the Minister to revoke an environmental approval if and/or when new evidence about the potential of significant environmental harm becomes available, and (b) require that any amendment of significant implementation conditions be assessed by the EPA at the same level of public consultation as occurred when the original proposal was assessed.

specify the circumstances under which any such request might be made. This section is also silent on what process is to be followed should the Minister decide not to request the EPA to inquire into the proposed revision of implementation conditions.

e. Lack of clarity regarding implementation conditions

We stress that the form of words adopted in specifying implementation conditions is critical to the subsequent implementation of a proposal and any enforcement thereof. Clarity is required not only for proponents to ensure that their obligations are understood, but also for those charged with ensuring that implementation conditions are followed. Under subsection 44(2) of the EP Act, the EPA is charged with preparing a report on the procedures and conditions to which implementation should be subject. Here ‘procedures’ relate to such matters as the preparation of a fauna management plan, while a ‘condition’ might focus on the maximum loss of populations of specified fauna. Procedures can be more readily enforced than conditions, but compliance with a procedure is one step removed from an actual environmental outcome (for example, the effectiveness of any particular fauna management plan can be questioned). We therefore urge that, wherever possible, the EPA should impose objectively verifiable conditions, in order that compliance can be monitored with measurable outcomes in view.

It is important that these measurable outcomes are identified as part of the public EIA process rather than merely left for inclusion in subsidiary environmental management plans which are not presented to the EPA or the public at the time of assessment but are generally negotiated with officers of DWER after the environmental approval is obtained. Occasionally these are released to the public, generally after they have been approved by OEPA. This makes the whole EIA process less than transparent as the Board and the public are excluded from the detailed assessment and the imposition of the all-important procedures and conditions for the project. It is essential that EIA is not delegated to the OEPA via these subsidiary management plans.

Recommendation 12: We recommend an amendment to section 44 to require that, wherever possible, the EPA impose clear and objectively verifiable conditions so that compliance can be assessed and monitored using measurable outcomes.

f. Failure to define significance in the body of the EP Act

At present, the criteria for defining ‘significance’ with respect to the environmental consequences of development proposals are generally listed as separate administrative procedures under section 122 of the EP Act rather than in the body of the Act itself. In this form, they are less amenable to judicial review than would be the case if they were nominated in the body of the Act. Hence their inclusion in the body of the Act would enhance their justiciability, especially should an environmental court or tribunal eventuate (see Recommendation 14).

We note that the principles for clearing native vegetation provide an exemplar that is already in the Act (Schedule 5).

Recommendation 13: We recommend that the Act be amended to include criteria for determining significance in the body of the Act rather than locating such criteria within the separate administrative procedures

g. Reliance on offsets: a problematic solution to environmental harm

Because environmental offsets are not defined in the EP Act, their interpretation depends on various statements in the EPA's guidelines and position statements. These interpretations have been weakened over time. Position Statement 9, formulated in 2006, explicitly states that offsets cannot be used when significant residual impacts to critical environmental assets are involved. The current WA Offsets Policy, formulated in 2014, modifies this principle by simply affirming that:

Environmental offsets will only be applied where the residual impacts of a project are determined to be significant, after avoidance, minimisation and rehabilitation have been pursued (p. 7).

Traditionally, an EPA conclusion that a proposal's impacts remain significant, notwithstanding an environmental assessment and the imposition of conditions that avoid, minimise and rehabilitate these impacts, would have probably led to a report that recommended that the proposal not be implemented, thus ruling any offsets out of court.

The current WA Offsets Policy creates considerable uncertainty for all parties when it further states that:

Environmental offsets are not appropriate in all circumstances. The applicability of offsets will be determined on a project-by-project basis. (p.8).³

This policy retreat is the more worrying given that offsets can be subject to double-counting, misrepresentation and miscalculation. We note that a recent survey found that of the offsets approved between 2004 and 2015 in WA, only 39 per cent had an outcome that could be considered effective.⁴ Hence, we emphasise that offsets are appropriate only in limited circumstances, where the environmental loss or damage in one area can be demonstrably counterbalanced by equivalent and proximate improvements in another.

Recommendation 14: We recommend that the EPA's policies and guidelines be amended to limit the use of offsets and make explicit the circumstances under which they can be applied.

³ Environmental Protection Authority, *WA Offsets Guidelines*, August 2014, http://www.epa.wa.gov.au/sites/default/files/Policies_and_Guidance.

⁴ J. May, R. J. Hobbs and L. Valentine, 'Are offsets effective? An evaluation of recent environmental offsets in Western Australia', *Biological Conservation*, vol. 206, 2017, pp. 249–5

h. Lack of resources for the OEPA

Inadequate resourcing deters the Office of the EPA from seeking independent advice on proposals and limits the ability of its audit and compliance branch to check on implementation conditions including environmental offsets and other commitments. Audit and compliance reports should be readily available to the public via an interactive database.

Recommendation 15: We recommend that the funding arrangements for the EPA should be reviewed to ensure that the auditing and compliance branch is able to carry out its functions effectively.

RECTIFYING WEAKNESSES IN THE MONITORING AND APPEALS PROCESSES ASSOCIATED WITH THE EP ACT

We point to two critical weaknesses in the monitoring and appeals processes currently associated with the EP Act.

- a) Lack of public redress when proponents and/or delegates fail to comply with the agreed implementation conditions
- b) The absence of a specialised environmental court or tribunal.

a. Lack of public redress when proponents and/or delegates fail to comply with the agreed implementation conditions

Under s.48 of the EP Act, the responsibility for monitoring proponents' compliance with imposed implementation conditions is vested in the CEO of the Department of Water and Environmental Regulation (DWER) and/or in the relevant decision-making authority. These provisions do not allow for public redress if and when proponents and/or delegates are seen to fail to comply with the agreed implementation conditions.

This was illustrated in the case of Roe 8, where, according to the Citizen Watchers' evidence, Main Roads WA systematically failed to adhere to several provisions of the critical Fauna Management Plan. The group's evidence was presented to the Senate Inquiry into the Continuation of the Construction of the Perth Freight Link (February 2017), but prior to that, the Citizen Watchers had no official means of redress.⁵

⁵ The breaches documented by the Citizen Watchers included the failure to adhere to the two-day clear period before bulldozing an area; poor trapping standards for Southern Brown Bandicoots; deficiencies in the reptile and turtle removal programs; the lack of adequate fencing to protect fauna in the areas being cleared; and inadequate surveys of black-cockatoo and other bird nesting sites before construction began.
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/PerthFreight

Recommendation 16: We 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.

b. The absence of a specialised environmental court or tribunal

At present, there are two options for seeking review of the recommendations and decisions made under the EP Act. The first is detailed in Part VII of the EP Act, which provides for appeals in a variety of circumstances: against the reports of the EPA; against decisions relating to clearing permits, works approvals and licenses; and against notices issued under various sections of the Act. Within these categories, any person (individual, proponent, responsible authority, applicant etc.) can lodge an appeal with the Environment Minister. The determination of an appeal is subject to closed deliberations rather than being conducted in an open forum, with the appeal finally being determined by the Minister rather than by an independent arbiter. Under the second option, appellants can seek judicial review of the Minister's decision. In this case, the process is open, but is only able to consider whether due process was followed in the first instance.

In addressing this issue, all other states and territories have an independent authority charged with merits review. So, what is needed in WA is a forum that can, in effect, take the place of the Minister in the existing appeal provisions under the EP Act, and hear and determine the merits of complaints against Ministerial decisions in an open and independent manner.

Recommendation 17: We recommend that WA establish a specialised environmental court or tribunal to deal with merits-based environmental decisions.

CLEARING PRINCIPLES

Schedule 5 to the present Act provides for the principles that should be followed in determining applications for clearing permits. These state that native vegetation should not be cleared if;

- (a) it comprises a high level of biological diversity; or
- (b) it comprises the whole or a part of, or is necessary for the maintenance of, a significant habitat for fauna indigenous to Western Australia; or
- (c) it includes, or is necessary for the continued existence of, rare flora or fauna; or
- (d) it comprises the whole or a part of, or is necessary for the maintenance of, a threatened ecological community; or
- (e) it is significant as a remnant of native vegetation in an area that has been extensively cleared; or
- (f) it is growing in, or in association with, an environment associated with a watercourse or wetland; or
- (g) the clearing of the vegetation is likely to cause appreciable land degradation; or
- (h) the clearing of the vegetation is likely to have an impact on the environmental values of any adjacent or nearby conservation area; or

- (i) the clearing of the vegetation is likely to cause deterioration in the quality of surface or underground water; or
- (j) the clearing of the vegetation is likely to cause, or exacerbate, the incidence or intensity of flooding or salinisation.

This approach places the onus of proof on those wishing to preserve native vegetation rather than assuming the value of native vegetation from the outset. We therefore support the suggestion that a separate Act be developed. In the interim, we recommend that the Clearing Principles be rewritten as duties that flow from the axiom that ‘native vegetation should only be cleared if it is absolutely necessary and if;

- (a) it comprises only a low level of biological diversity and clearing the land will not result in a cumulative loss of critical habitat for native species; or
- (b) it does not comprise the whole or a part of, or is unnecessary for the maintenance of, a significant habitat for fauna indigenous to Western Australia;
- (c) etc

Recommendation 18: We recommend that Schedule 5 to the EP Act be amended to provide for Clearing Principles written as duties that flow from the axiom that ‘native vegetation should only be cleared if absolutely necessary and if’, rather than the present framing which states that ‘native vegetation should not be cleared if’. The Act should also be amended to prohibit clearing that is seriously at variance with the Clearing Principles.

NO LEGISLATIVE REQUIREMENT FOR REGULAR STATE OF THE ENVIRONMENT (SoE) REPORTING ⁶

State of the environment reporting offers a widely-used and valuable process for monitoring the condition of the environment; analysing the impact of human activities on the environment; and evaluating how, as a society, we might best respond to environmental trends and threats. In contrast to all other jurisdictions except the Northern Territory, WA has no legislative requirement for regular SoE reporting, and its last report was published in 2007. (As the Act now stands, sections 16 and 17, which deal respectively with the functions and powers of the EPA, could imply, but do not require, SoE reporting). While there are other important means of recording state-wide environmental data, including the EPA’s annual reports and the Biodiversity Audits carried out by the Department of Biodiversity, Conservation and Attractions (DBCA), WA’s current retreat from SoE reporting means that its ability to plan for its local environment and to make a significant contribution to a comprehensive national program are commensurately reduced.

⁶ This issue is fully discussed in our recent paper: John Bailey, Trish Harris & Philip Jennings (2018) State of the environment reporting in Western Australia: law, land and beyond, *Australasian Journal of Environmental Management*, DOI: [10.1080/14486563.2018.1486238](https://doi.org/10.1080/14486563.2018.1486238)

Recommendation 19: We recommend that a new section 21A be added to the EP Act, to impose a duty on the EPA for regular SoE reporting; to specify the required content of SoE reports; and to ensure the regular tabling of reports in Parliament accompanied by a Ministerial response.

In conjunction with this recommendation, we stress the importance of ensuring effective governmental involvement in the environmental action plans that should follow SoE reports. The EPA's 2007 SoE report emphasised that:

We need to ensure that the State of the Environment Report is an ongoing publication, and that an environmental action plan is developed that clearly influences policy decisions and priorities for budget expenditure on the environment (EPA, 2007, p. xii).

In the event, there was no WA governmental response to the 2007 report and no environmental action plan was prepared.

Recommendation 20: In regard to SoE reporting, we propose two alternatives, one more extensive than the other. The first, alternative would require government departments and agencies to prepare and lodge their environmental action plans with the EPA, and to report annually upon their progress in implementing these plans under specified timelines. The second more extensive option is modelled upon WA's *Financial Management Act 2006* and could be achieved either through amendments to the EP Act or a special purpose Act.

CONCLUDING COMMENTS

The EP Act has considerable strengths, most particularly its comprehensive qualities and commitment to ecologically sustainable development principles. Its weaknesses, as outlined here, can be variously attributed to:

- ⇒ legislative lacuna that leave each of the EPA, EPPs and EIA open to political influence and/or pro-development interests;
- ⇒ the effect of the 1996 amendments in diluting the powers of the EPA and the Environment Minister;
- ⇒ the absence of required public input in important instances (including the revocation of EPPs; changes to agreed implementation conditions; and the formulation of ERs attached to rezoning and development proposals);
- ⇒ excessive discretionary decision making on the part of the EPA, underpinned by the status of its policies and guidelines;
- ⇒ a failure to keep up with developments, in other Australian jurisdictions, in relation to SoE reporting; and
- ⇒ the failure to establish a specialised environmental court or tribunal.

We contend that each of these deficiencies must be rectified if the EP Act is to resume its good standing in Australian legislation and if the environment of WA is to be adequately protected. We offer this paper and the recommendations contained therein as a basis for further discussion of these matters.

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