



Environmental Protection Act 1986 (WA)
Amendments

Discussion Paper & Exposure Draft Bill –
October 2019

Submission to Department of Water and Environmental Regulation

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About CME

The Chamber of Minerals and Energy of Western Australia (CME) is the peak resources sector representative body in Western Australia. CME is funded by member companies responsible for more than 90 per cent of the State's mineral and energy production and workforce employment.

In 2018-19, the Western Australia's mineral and petroleum industry reported a record value of \$145 billion.¹ Iron ore is currently the State's most valuable commodity at \$78 billion. Petroleum products (including crude oil, condensate, liquefied natural gas, liquefied petroleum gas and natural gas) followed at \$38 billion, with gold third at \$12 billion.

The value of royalties received from the sector totalled \$6.8 billion in 2018-19, accounting for 21 per cent of general government revenue.^{2 3 4} In addition to contributing 40 per cent of the State's total industry Gross Value Added,⁵ the sector is a significant contributor to growth of the local, State and Australian economies.

Summary of recommendations

Recommendations addressing key concerns

CME highlights it has been difficult to fully assess the implications of proposed amendments to the *Environmental Protection Act 1986* (EP Act) without a thorough understanding of consequential amendments to the *Environmental Protection Regulations 1987* (EP Regulations). Much of the detail and hence the practical effect of proposed amendments cannot be adequately considered in the absence of required regulations. Noting this, CME looks forward to further engagement with the Department of Water and Environmental Regulation (DWER) on the proposed amendments to the EP Regulations and any new regulations required to support proposed amendments.

Additionally, to provide sufficient clarity and confidence in the 'whole of government' approach to environmental protection, the interplay between the EP Act and other relevant legislation requires further consideration (including consequential amendments) by DWER and associated agencies. This approach would be consistent with the government's commitment to *Streamline WA*.

In order to progress development of the Exposure Draft Bill (Draft Bill), CME recommends DWER prioritise the recommendations below which address the key issues of concern to the resources sector.

General

- Assess the interactions between the EP Act and other Acts and Regulations, and where applicable, the incorporation of necessary amendments in the EP Act to ensure compatibility and eliminate duplication.
- Increase use of statutory timeframes for amendments and secondary approvals.
- Add express powers to supersede, combine and/or split Ministerial Statements, applicable also to proposals that have more than one Ministerial Statement as a result of s46 changes, derived proposals, and the combination of derived proposals with existing approved proposals.

Part I – Preliminary

- Review and simplify definitions of decision-making authorities (DMAs) to support the consistent identification of appropriate and accountable DMAs as required for proposals and significant amendments.
- Explicitly exclude heritage aspects from the definition of social surroundings to remove duplication between the EP Act and the *Aboriginal Heritage Act 1972* (AH Act).

¹ Government of Western Australia, *Latest statistics release: Mineral sector highlights*, Department of Mines, Industry Regulation and Safety, September 2019: <http://dmp.wa.gov.au/About-Us-Careers/Latest-Statistics-Release-4081.aspx>

² References hereafter to government refer to the Government of Western Australia, unless otherwise indicated.

³ Government of Western Australia, *Annual report 2018-19*, Department of Mines, Industry Regulation and Safety, November 2019, p. 77.

⁴ Government of Western Australia, *2018-19 Annual report on State finances*, Department of Treasury, September 2019, p. 8.

⁵ Duncan, A. and Kiely, D., *BCEC Briefing note: WA Economic update*, Bankwest Curtin Economics Centre, November 2019, p. 4.

Part IV – Environmental Impact Assessment

- Substantially re-write Part IV to reduce drafting complexity and more clearly and simply articulate fundamental principles and processes.
- Add a specific trigger (sub-clause) for referral of an 'amendment' under s38.
- Add an express power for the Environmental Protection Authority (EPA) to determine a third-party referral as invalid and therefore not accept it.
- Add express powers to clarify how s41, 45C, and 46 to 46C relate to referrals and decisions in relation to strategic assessments and derived proposals.
- Add a clause under s39B providing a statutory timeframe for the EPA to declare whether a referred proposal is a derived proposal.
- Add express powers allowing for strategic assessments and conditions to be updated if significant new information becomes available (without retrospective impact on previously derived proposals that are already approved).
- In circumstances where the criteria in s39B(4) are met, allow assessment to the relevant new issues, information or change thereby permitting new issues to be assessed whilst ensuring issues already addressed in the strategic assessment avoid re-assessment.
- Specify that any cost recovery model / framework must demonstrate improved efficiency, productivity and responsiveness of government activities and accountability for those services.
- Implement and publish metrics for whole of government performance to ensure accountability and transparency in respect of cost recovery and service deliverables.
- Remove the term “implementation” under proposed s48AA(1) to clarify that Part IV cost recovery only applies to referral services and environmental impact assessment services.

Part V – Environmental Regulation

- Recommend detailed analysis of the interacting issues with the *Biodiversity Conservation Act 2016* (the BC Act) and the EP Act, and the implementation of the BC Act more broadly, and where possible, remedy issues through this amendment opportunity.
- Include a mechanism to allow applicants to bypass the clearing permit referral process and move straight into the clearing permit application process.
- Redraft s51DA to clarify the statutory timeframe for DWER's response to clearing permit referrals, and the process by which clearing permit referrals become clearing permit applications.
- Add an ability to appeal a referral decision that a clearing permit is required.
- Remove the phrase "accompanied by" throughout the EP Act, in consideration of the *Forrest & Forrest Pty Ltd v Wilson & Ors* (2017) 262 CLR 510 (Forrest & Forrest) High Court Case.
- Clearly specify in DWER's supporting administrative procedures and guidance the intent that construction, commissioning and operation will be permitted to be captured under a single licence application.
- Further consult and more clearly draft Division 3 regarding the interaction of prescribed activities, offences and potential defences, including emissions that occur outside prescribed areas surrounding authorised activities.
- Provide further information on the application and use of voluntary licences.
- Amend Division 3 to specify that the process for applying for voluntary licences can only be initiated by the licence holder.
- Amend Division 3 to explicitly state that clearing permits provide authorisation for both the activity and the clearing.
- Ensure the second reading speech for the Bill provides clarification and confirms DWER's intent of applying a risk-based approach for defences offered by licences.
- Modify or remove s74A(2) to ensure consistency with a risk-based approach.

Part VI – Enforcement

- Fully assess the interactions of powers for inspectors to use reasonable force under the EP Act and duties under *Mines Safety and Inspection Act 1994* (MSIA) and other relevant safety Acts and Regulations.
- Ensure adequate protections are afforded to those potentially liable under these other legislative instruments due to actions taken by inspectors under the EP Act.

Part VII – Appeals

- Initiate a wider review of appeals as a priority and, in the interim, introduce an express power for the Appeals Convenor to compel public authorities, or other DMAs, to respond to appeals within a specified timeframe, or as otherwise agreed in writing, as an initial step to improve timeliness of the current process.

Part IXA – Bilateral agreements with the Commonwealth

- Ensure any introduction of fees associated with bilateral agreements do not result in duplication of assessment or administrative effect, or fees between State and Federal process or other Acts.

Schedule 2 – Matters in respect of which regulations may be made

- Conduct cost benefit analysis of alternative responses to application quality issues to find the most appropriate, reasonable and effective response.
- Remove the head power for accreditation of environmental practitioners.

Context

CME welcomes the opportunity to provide a submission on the proposed amendments to the EP Act detailed within the Discussion Paper and Exposure Draft Bill released by the DWER in October 2019.

The Discussion Paper details proposed amendments to the EP Act, outlines new areas of environmental reform, and presents additional stakeholder proposals and issues for consideration in the review of the EP Act.

Responses to the Discussion Paper

CME has consulted extensively with its members to inform its submission in response to the Discussion Paper and Exposure Draft Bill.

CME supports DWER's stated objectives to modernise and streamline processes to improve regulatory effectiveness. Crucially, streamlining initiatives must be implemented in a manner that maintains the State's high standards of environmental protection whilst delivering an accountable, transparent and legally robust framework. CME welcome the current *Streamline WA* initiative and suggest that separate to the current proposed amendments to the EP Act addressed below there should be an opportunity for a more comprehensive review and reform of the EP Act and related regulation in Western Australia (WA).

In making this submission, CME has had regard to the Council of Australian Governments' (COAG) Principles of Best Practice Regulation.⁶

This submission firstly provides high-level comments on key issues followed by specific, detailed responses on each proposal in Appendix I, and responses to specific amendments within the Exposure Draft Bill in Appendix II.

CME have reviewed the Exposure Draft Bill under the reasonable assumption that all proposed amendments have been indicated in tracked changes within the released consultation document, and as such, have focussed our review on said tracked changes. It should be noted that at least two amendments within the Exposure Draft Bill were not marked in tracked changes raising the possibility that other amendments were similarly (presumably inadvertently) not tracked. CME notes that the Discussion Paper was high-level and did not address all tracked changes within the Exposure Draft Bill further complicating the task of identifying and evaluating all the potential proposed changes.

Additionally, several drafting issues were identified in the Exposure Draft Bill, with incorrect cross-referencing and inconsistent numbering of sections and Parts further hindering evaluation of proposed amendments within the tight timeframes permitted.

In this context, CME urges DWER to undertake necessary steps to ensure all inputs into the EP Act Amendment review process are duly considered and adequately summarised, in turn, fed back to participating stakeholders to ensure clarity and confidence in the outcomes.

General

1.1. Interactions with other Acts and Regulations

The overall success of the wider reform package will depend on consideration of how the EP Act interacts with other Acts and Regulations (including the AH Act, BC Act, *Contaminated Sites Act 2003*, and *Environmental Protection (Unauthorised Discharges) Regulations 2004*). Consistent with the aspirations of *Streamline WA*'s 'whole of government approach' to make it easier to do business in WA, every opportunity ought to be taken to ensure associated regulatory practices are efficient and free from duplication. **CME strongly recommend an assessment of the interactions between the EP Act and other Acts and Regulations, and where applicable, the incorporation of necessary amendments in the EP Act to ensure compatibility and eliminate duplication.**

⁶ Council of Australian Governments, *Best Practice Regulation – A Guide for Ministerial Councils and National Standard Setting Bodies*, October 2007, p. 4.

1.2. Statutory timeframes

Statutory timeframes provide certainty for business planning with clear expectations for government and proponents regarding assessment and approval timelines. Internal government key performance indicators, whether externally publicised or internally monitored, do not provide proponents a reasonable level of clarity or certainty for amendments or secondary approvals. **CME recommend increased use of statutory timeframes including for amendments, appeals and secondary approvals.**

1.3. Supersede, combine and/or split Ministerial Statements

The current lack of flexibility in the administration of Ministerial Statements, specifically in relation to the ability to supersede, combine and/or split, is placing an unnecessary regulatory burden on proponents and government. In the absence of powers to supersede Ministerial Statements, proponents are required to continue to monitor, assess and / or report against compliance requirements for projects which have not proceeded to commence (and have since been shelved), or have been completed and are no longer operational. The absence of powers to combine and / or split Ministerial Statements unnecessarily complicates the process of asset divestment and mergers, requiring proponents to duplicate approvals for divested assets, and managed duplicate approvals for merged assets. Although some attempts to improve this situation have been adopted in the proposed amendments, including introducing the ability to formally terminate Ministerial Statements, in CME's view, the proposed amendments are not sufficient. **CME strongly recommend inclusion of express powers to supersede, combine and/or split Ministerial Statements, applicable also to proposals that have more than one Ministerial Statement as a result of s46 changes, derived proposals, and the combination of derived proposals with existing approved proposals.**

Part I – Preliminary

2.1. Definition of decision-making authority (section 3(1) and consequential amendments in numerous other sections)

Although CME supports the intent of refining the DMA process to link more directly to DMAs of relevance, CME does not support the introduction of two tiers of DMAs as currently drafted. The drafted proposal is overly complex, inconsistently drafted and at times unclear.

The proposal to define key and non-key DMAs with the introduction of key DMAs (under s45) does not achieve the objective of improving the accuracy of determining relevant DMAs for proposals, or significant amendments to approved proposals, but rather adds another layer of complexity to the determination of a DMA which amendments to s45 do not clearly or fully articulate. Amendments are recommended which either:

- (i) Simplify the two tiers of DMAs (key and non-key DMAs) into a single, updated definition of a DMA (under s3); narrowing a DMA to only be those with a major role in making decisions (so as to make the key DMA concept be the DMAs only). All other relevant public authorities and Ministers can still be stakeholders that are consulted, informed or similar through administrative or other processes. Consequential amendments will be required throughout the EP Act; or
- (ii) Redraft s45 to clarify how the two tiers of DMAs (key and non-key) must function when deciding if a proposal may be implemented.

CME recommend the review and simplification of definitions of DMAs to support the identification of appropriate and accountable DMAs as required for proposals and significant amendments.

By extension, CME supports the proposal to narrow DMAs for amendments to be only those DMAs of specific relevance or responsibility to that amendment rather than the proposal in its entirety.

2.2. Definition of social surroundings (section 3(2))

The protection of heritage aspects of Aboriginal heritage sites is best regulated under the AH Act and its proposed replacement legislation currently being drafted, whilst the environmental aspects of significant sites (e.g. emissions impact) are to be regulated under the EP Act. Removal of duplication across Acts is a key priority of the Government's *Streamline WA* initiative and opportunities to remove obvious duplication must be seized as these opportunities arise. Current drafting of s3(2) does not reflect this.

CME recommend explicit exclusion of heritage aspects from the definition of social surroundings.

Part IV – Environmental Impact Assessment

Part IV has now been amended multiple times without an associated 'clean up' of the drafting. The current proposed amendments add to the complexity of the drafting and there are now numerous and frequent cross-references to different sections and poorly structured / grouped sections. The complicated drafting and cross-references increase the likelihood of errors and omissions in drafting of the Bill as well as the risk of legal challenge. Overall, the drafting of Part IV appears to be unnecessarily complex and unwieldy making it difficult to understand and implement.

CME recommend a substantial re-write of Part IV to reduce drafting complexity and more clearly and simply articulate fundamental principles and processes.

3.1. Referral of proposals to Authority (section 38)

CME support flexibility for proponents to amend or withdraw a proposal prior to a decision on assessment without impacting the right to refer the proposal in the future.

CME also supports the intent of the reform to clarify treatment of amendments to proposals, however the current drafting of Part IV does not achieve this objective as it remains unclear and ambiguous in several areas. **CME recommend a specific trigger (sub-clause) be added for referral of an 'amendment' under s38.** This will greatly simplify the overall drafting of Part IV and improve readability, clarity and implementation (for example, the prohibition on other DMAs granting other approvals).

Under s38AB, if a third party referred a proposal, and in the view of the proponent the proposal referred was inaccurate, incomplete, premature (etc.), the proponent may seek to have the specific proposal withdrawn so as to enable the proponent to refer the proposal once appropriately scoped. This proposal would then be open again to third party referral prematurely and/or inaccurately (potentially multiple times) frustrating the process and consuming the EPA's resources. **CME recommend adding a power for the EPA to determine a third-party referral as invalid and therefore not accept it.** Allowing the EPA to deem a referral as invalid or not accepted may also assist with third-party referrals where that proposal has appropriately been addressed through Part V (and is not significant) or pre-dates Part IV. CME remains concerned there is a risk of third-party referrals for pre-existing proposals that pre-date Part IV.

3.2. Strategic assessments and derived proposals (section 39B)

The application of s41, 45C, and 46 to 46C remains unclear with regard to referrals and decisions relating to strategic assessments and derived proposals. In particular, those provisions should apply to the notice issued under s45A(2) in respect of a derived proposal as well as to the implementation agreement or decision in respect of the strategic proposal under s45. **CME recommend that express powers be added to clarify how s41, 45C, and 46 to 46C relate to referrals and decisions in relation to strategic assessments and derived proposals.**

To increase potential uptake and usability of strategic assessments as a viable option, **CME also recommends:**

- **A clause be added under s39B providing a statutory timeframe for the EPA to declare whether a referred proposal is a derived proposal;**
- **Powers be added such that there is provision for strategic assessments and conditions to be updated if significant new information becomes available (without any retrospective impact on previously derived proposals that are already approved).** This would facilitate keeping the strategic assessment contemporary and usable, rather than risk eliminating all future derived proposals being unsuccessful due to the emergence of new environmental factors or contemporary condition requirements; and
- **In circumstances where the criteria in s39B(4) are met, allow assessment to the relevant new issues, information or change thereby permitting new issues to be assessed whilst ensuring issues already addressed in the strategic assessment avoid re-assessment.**

3.3. Fees and charges relating to referral and assessment of proposals (section 48AA)

Although CME understands the potential drivers for the Government to establish cost recovery of Part IV referral and assessment services, further information is required regarding the proposed cost recovery framework, modelling and, importantly, how it will improve service efficiencies and timely delivery. The WA Government has implemented multiple cost recovery frameworks previously which cumulatively impact on the cost of doing business in WA of mandated government services, which leads to issues relating to cross-subsidisation, inequitable application, and a lack of performance reporting, transparent accounting reporting or hypothecation of the funds recovered.

The development of cost recovery provisions must be conducted in consultation with industry and based on a robust business case, ensuring the resultant framework is underpinned by the key principles of:

- Efficiency and effectiveness;
- Transparency and accountability; and
- Stakeholder engagement.

A framework based on the above principles should promote a cost recovery framework that is successful from the viewpoint of both regulator and business, facilitating a culture of efficient, best-practice regulation. To reinforce this behaviour however, any efficiency gains achieved will need to be retained and ‘ring fenced’ by the agency, rather than returned to the Consolidated Account.

For some schemes that have transitioned to industry-funded cost recovery, CME members have not seen a corresponding increase in the quality or consistency of service delivery, and in some cases, a decline has been observed. As these various cost increases are in addition to existing taxes, royalties and fee payments made to all levels of government, this contributes to the negative perception of a “death by a thousand cuts” scenario whereby industry becomes less competitive and at the same time subsidises or masks inefficient government services. The development and implementation of a cost recovery model should be in accordance with the Australian Governments’ Cost Recovery Guidelines (CRGs)⁷. **CME recommends that any cost recovery model / framework must demonstrate improved efficiency, productivity and responsiveness of government activities and accountability for those services.**

Furthermore, consistent with the CRGs, **CME strongly recommends that implementation of the cost recovery model be supported by publication of metrics for whole of government performance to ensure accountability and transparency in respect of cost recovery and service deliverables.**

In the development of a model for cost recovery for Part IV referral and assessment services, the following considerations are paramount:

- Clarification of what activities are captured under “administration of Part IV of the EP Act only” (as stated in the Discussion Paper).
- Part IV application fees should be appropriate in scale so as to not discourage referral or create additional barriers to entry.
- Fees should be standardised across the board and not scaled for individual industries.
- Fees and charges for bilateral approvals and bilateral assessments must prevent duplication of costs for government services imposed on proponents.
- The timing of application fees must be clarified.
- Disclosure of sums received and expenditure.

It is understood from review of the Discussion Paper that the detail of the cost recovery model is to be captured in supporting regulations, and that, as advised by DWER, members of Parliament are to be briefed about the intent and principle structure of cost recovery for Part IV services prior to debate on the Bill. Industry must be engaged as part of this process and CME looks forward to this consultation and further information prior to forming a final industry view on the proposal.

CME is of the understanding that the State is considering a fee structure associated with referral services and environmental impact assessment services only. For consistency with this intent, **CME recommend removal of the term “implementation” under proposed s48AA(1).**

Part V – Environmental Regulation

4.1. Referral of proposed clearing to CEO for decision on whether a clearing permit is needed (section 51DA)

CME is of the view that there are issues and inconsistencies between the clearing framework in the EP Act and the BC Act which have not been resolved in this Bill. In part, these issues may stem from the limited implementation of the BC Act to date and the teething issues, including lack of implementation guidance,

⁷ Australian Government, *Australian Governments’ Cost Recovery Guidelines (RMG 304)*, Department of Finance, January 2020: <https://www.finance.gov.au/publications/resource-management-guides/australian-government-cost-recovery-guidelines-rmg-304>

associated with a new Act. **CME recommends detailed analysis of the interacting issues with the two Acts and the implementation of the BC Act more broadly and where possible, for issues to be remedied through this amendment opportunity.** In some instances, the BC Act may more appropriately need to be amended.

Although CME supports the intent of introducing the proposed referral and decision process (to allow the CEO to decide that a clearing permit is not needed), the majority of clearing that is typically done by our members using a clearing permit will likely still require a clearing permit in the future. Therefore, introducing a mandatory referral, assessment and decision step in advance of that clearing permit assessment introduces an unnecessary step and additional delay. **CME strongly recommend a mechanism be inserted into the EP Act to allow applicants to bypass the referral process and move straight in to the clearing permit process.** The absence of this option introduces unnecessary 'red tape' and duplication, is a significant concern to CME.

Regarding s51DA(7)(b), this section appears to be an attempt at defining a statutory timeframe for the clearing referral process and a means to give a proponent a way to move forward if that timeframe has lapsed. This intent is supported, however as drafted, it does not appear to be practical or effective. After the 21 days, it is possible the proponent completes this request, but this request may not be accepted or acknowledged and so it remains unclear how the referral automatically becomes a clearing permit application. CME is concerned about potential delays and uncertainty of status from the process as currently drafted. **CME recommend redrafting of s51DA to clarify (i) the statutory timeframe for DWER's response to clearing permit referrals; and (ii) the process by which clearing permit referrals become clearing permit applications.**

As the referral process (and associated decision) for clearing applications is a new process inserted into the EP Act, **CME recommend adding an ability to appeal a referral decision (i.e. to dispute that a permit is required)** as the pre-existing appeals processes have not contemplated this new process.

Regarding s51DA(8), current drafting may create a Forrest & Forrest-type issue, as it requires that if the form and fee are not all simultaneously received by DWER, the application must be declined by the CEO. **CME strongly recommend removal of the phrase "accompanied by" throughout the EP Act.**

To support implementation of the new referral process, departmental guidance needs to be developed to capture the following detail:

- Outline how the referral process for clearing permits will operate.
- Level of information required for the referral.
- Structure of the referral document.
- Timing of regulatory review of the referral.
- What other documents need to be compiled after the referral.
- The process as a flow diagram (similar to the Part IV diagram on the EPA website).
- Confirmation if the referrals will be published and publicly available similar to the Part IV Projects on the EPA website.
- How the referral process will work with clearing permits which are assessed by the Department of Mines, Industry Regulation and Safety (DMIRS).

CME supports the intent of the reform to provide greater legal certainty for clearing exemptions through prescribed enactments. As indicated by DWER as the intent, this prescription must ensure the existing exemptions understood to exist will be preserved and prescription will not be used as a means to narrow or withdraw existing exemptions.

4.2. Licences (Division 3)

CME supports, in principle, the move towards regulation of prescribed activities and the combination of works approvals and licences into a single instrument (licence). **To ensure improvement in assessment and approvals efficiency, the intent that construction, commissioning, and operation will be permitted to be captured under a single licence application should be clearly specified in DWER's supporting administrative procedures and guidance.** This will limit potential implementation creep over time and mitigate against the risk that the efficiency benefit from this option is administratively lost over time.

As Part V licences will still in part be tied to a location, it remains unclear how locations will interact with Part IV development envelopes and how a location will limit emissions. Further clarification on this and the impact on licence conditions is required. Further, current drafting does not clarify the offences and potential defences

for emissions which occur outside of licence boundary surrounding prescribed activities. **CME strongly recommend further consultation and clearer drafting regarding the interaction of prescribed activities, offences and potential defences, including for emissions that occur or extend outside prescribed areas surrounding authorised activities.**

As advised by DWER, the change from regulation of prescribed premises to activities is intended to address current issues associated with mobile plant licensing. Tying licences to activities rather than to premises introduces a practical flexibility which is expected to benefit operational management, regulatory efficiency and improve environmental management. However, as the Discussion Paper does not provide detail on the important consequent amendments to the EP Regulations, there remains uncertainty pending updates to Schedule 1 of the EP Regulations regarding definition of activities and related thresholds. Extensive industry consultation will be essential as part of updating the EP Regulations.

The proposed amendments allow licences to overlap, for example, one physical area may be shared by multiple operators carrying out activities with similar emissions and/or discharges. CME notes, this may cause compliance issues with emissions and discharges (e.g. leaks, spills) as it may prove difficult for DWER to determine who caused the pollution or release into the environment.

Although CME in principle supports the concept of voluntary licences, limited detail on application scope and explanation on regulation has been provided. CME is concerned that this voluntary process may become a mechanism for regulating all activities due to the risk of prosecution or result in a lowering of thresholds over time. **CME recommend further information be provided on the application and use of voluntary licences. CME also recommend amendment to Division 3 to specify that the process of applying for voluntary licences can only be initiated by the licence holder.**

4.3. Defences (Division 5)

CME supports the application of DWER's source-pathway-receptor approach, however, s74A(2) too narrowly defines the scope of the defence offered by a licence, consequently creating multiple unreasonable consequences for licence holders. This amendment will likely require proponents to comprehensively list every minor, low-risk emission to ensure a defence for emissions incidental to approved controlled works and prescribed activities undertaken. For example, reverse osmosis plants, wastewater treatment plants and oily water separators will likely not be required to be licensed as their emissions, being of low volume, will likely not exceed the threshold for emissions requiring licensing. However, due to the low threshold amount (\$20,000) for material and/or serious environmental harm, these low-risk emissions will likely exceed the threshold amount and thereby be considered environmental harm without actual environmental harm having occurred. This is unreasonable and inconsistent with a risk-based approach.

Additionally, in many instances, surrogates are appropriately monitored and limited (controlled) for emissions, rather than all emissions. These surrogates cannot protect a licensee from the other emissions to which the surrogate relates, so therefore all the other possible emissions will necessarily need to be listed and necessarily need to be monitored, potentially greatly increasing compliance costs and generating unnecessary work in order to avoid an offence (again, that is absent of causing environmental harm). The interaction of licensing with the defences and offences including impacts on use of surrogates needs to be reconsidered.

Under s74A(1)(ba)(i), a clearing permit must also provide a defence for necessarily associated matters directly stemming from the clearing. Clearing permits, therefore, must authorise the activity and the clearing. **CME recommend amendments to explicitly state that clearing permits provide authorisation for both the activity and the clearing.**

To assist with addressing CME's concerns above about regulatory intent and construction of the amendments, **CME strongly recommend the second reading speech for the Bill provides clarification of the regulatory intent of applying a risk-based approach for licences.**

Additionally, CME strongly recommend the modification or removal of s74A(2) and further requests a detailed discussion with DWER on how this section should alternatively function.

Part VI – Enforcement

5.1. Use of assistance and force (section 89A)

CME supports, in principle, the power for inspectors to use reasonable force, however, it is not sufficiently clear how these powers interact with requirements and duties under the MSIA (or other safety related

legislation). Under the MSIA, Registered Managers are responsible for ensuring the safety of all personnel on a mine site (refer s33 of the MSIA), and as such the EP Act should not in any way circumvent notifying the Registered Manager, or other responsible person at the mine site, of their presence. Note, Mine Safety Inspectors are required to provide notice of intention to inspect a site, refer s21(4) of the MSIA:

“21(4) Where a district inspector or special inspector intends to inspect and examine a mine under the powers conferred by this section, the inspector must, where practicable on entering the mine, give notice of his or her intention to do so, either to the principal employer or to the manager, or in their absence to another responsible person.”

Notification prior to entry allows at least the mine operator to ensure the inspector is overseen, and account for the inspector in the case of emergency. It is expected that the powers of inspectors under the EP Act would be similar to powers provided to inspectors under s21 of the MSIA:

“21(1) A district inspector or special inspector may, for the purposes of this Act —

(a) at all times of the day or night, enter, inspect, and examine any mine and examine any plant, substance, or other thing whatsoever at the mine (but must do so in such a manner as not unnecessarily to impede or obstruct the working of the mine); [...]

(c) conduct such examination and inquiry as the inspector considers necessary to ascertain whether the provisions of this Act have been and are being complied with in respect of a mine or a mining operation.”

DMIRS inspectors undergo substantial training and are intimately familiar with the hazards that occur in mining yet do not use reasonable force and will take reasonable measures to notify (etc.). It is questionable how DWER inspectors with potentially limited or no specialised knowledge of operational hazards would be safe to do otherwise. Further, it is unclear how an offence under the MSIA that stems as a direct result of actions taken by a DWER inspector using reasonable force (with no notification or potential knowledge of specialised operational factors) will be treated and how that will affect liabilities and penalties for the mining operator.

CME recommend the full assessment of the interactions of powers for inspectors to use reasonable force under the EP Act and duties under the MSIA and other relevant safety Acts and Regulations. Furthermore, CME recommends that adequate protections are afforded to those potentially liable under these and other legislative instruments due to actions taken by inspectors under the EP Act. This assessment must explicitly consider specialised hazards (e.g. blast zones, high walls, subsidence zones, confined spaces, high voltage facilities, underground operations) that frequently occur at mining operations, oil and gas facilities and other heavy industry sites.

Part VII – Appeals

The proposed reform is limited in terms of appeals. CME understands a wholesale reform of the appeals process is unlikely to be achievable in the short timeframe available, however legitimate concerns remain regarding the transparency, procedural fairness and timeliness of the appeals process as currently implemented. **CME request a wider review of appeals be initiated as a priority and, in the interim, recommend the introduction of an express power for the Appeals Convenor to compel public authorities, or other DMAs, to respond to appeals within a specified timeframe, or as otherwise agreed in writing, as an initial step to improve timeliness of the current process.**

Further, the full effect of wider EP Act amendments and application of appeals must be considered in the final drafting.

Part IXA – Bilateral agreements with the Commonwealth

CME supports the proposed amendments which ensure the State Government is able to fully implement bilateral agreements, thereby removing duplication between State and Federal assessment and approval processes and improving timeframes.

Any introduction of fees associated with bilateral agreements must ensure there is no duplication of assessment or administrative effort, or fees between State and Federal process or other Acts.

Schedule 2 – Matters in respect of which regulations may be made

8.1. Provide a head power for certified environmental practitioners

In discussions with DWER, CME understand that improved quality of applications and subsequently reduced assessment timeframes within DWER are the key objectives of this proposed amendment. However, the introduction of a head power for the accreditation of environmental practitioners is a disproportionate policy response to what is understood to be a small proportion of poor-quality applications received by DWER. A direct feedback mechanism to this issue already exists with longer assessment timeframes experienced by these applicants and potential risk of application rejection. Similar accreditation / certification schemes employed in other departments / jurisdictions (including DMIRS) have not resulted in improved quality or reduced assessment timeframes and in some recent examples have been abandoned as it became evident that the policy response did not achieve the desired objective.

CME strongly support the implementation of the COAG Principles of Best Practice Regulation⁸ and believe a range of alternative responses, including improved guidance, better templates, online application and assessment (automation with appropriate validations), and training, must be considered and their benefits and costs assessed to find the most appropriate, reasonable and effective response to this decidedly non-systemic issue. No analysis has been provided as to why this specific policy response has been provided for, nor has transparency been offered around other policy options considered (and presumably discounted).

The imposition of a requirement for the certification of application documentation will add another unnecessary layer of bureaucracy and is expected to result in substantially increased costs to the proponent (through either increased consultancy costs or through increased in-house costs where in-house training must then be provided (potentially 'doubling up' the burden in addition to increased consultancy costs) and extended assessment timeframes to account for additional red tape in application preparation and certification, while providing no tangible additional environmental benefit.

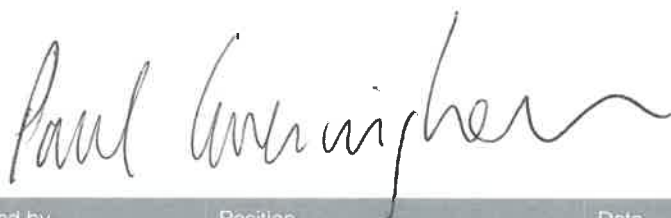
Introducing an arbitrary new certification process would also appear inconsistent with the Government's stated objectives of reducing red tape, unnecessary business and professional licensing requirements and broader *Streamline WA* initiatives to make it easier to do business in Western Australia.

Consultation with industry on this aspect and its value proposition for all proponents has been wholly inadequate. **CME does not support introduction of the head power for accreditation of environmental practitioners.**

Conclusion

CME thanks DWER for the opportunity to comment on these draft documents and looks forward to continuing to work with DWER through this Act review process and on the important supporting accompanying components contained in the regulations, associated guidance and explanatory materials. CME urges the government to invest adequate time and resources to provide this clarity and confidence in the end-to-end implications of the proposed Act amendments.

If you have any further queries regarding the above matters, please contact Kira Sorensen, Senior Policy Adviser – Environment, on 0448 468 632 or k.sorensen@cmewa.com.



28.01.2020.

| Authorised by | Position | Date | Signed |
|--------------------|--|------------|---|
| Paul Everingham | Chief Executive Officer | 28/01/2020 |  |
| Document reference | 200128-ENV-EP Act Amendments Submission-Final.docx | | |

⁸ Council of Australian Governments, *Best Practice Regulation – A Guide for Ministerial Councils and National Standard Setting Bodies*, October 2007, p. 4.

Appendices

Appendix I: Detailed responses to proposed amendments

Table 1: Responses to proposed amendments.

| Part | Section | Description of proposed amendment/s | Position | Response |
|---|---------|--|-------------------------------------|--|
| Part I – Preliminary | s3 | Amendments to definitions that are a consequence of amendments to other Parts of the EP Act. | Do not support as currently drafted | <p>“Decision-making authority” and “key decision-making authority”, s3(1)</p> <p>Refer to section 2.1 above.</p> <p>"Waste", s3(1)</p> <p>As previously raised with DWER, this definition of 'waste' is problematic. Although a wholesale revision of the waste legislative regime is not appropriate at this time, minor improvements should be possible as part of this reform. For example, DWER has released guidance around 'what is waste' – the core aspects of this should be incorporated so as to give that guidance some standing (guidance currently cannot overrule / out rank the definition here in the EP Act).</p> <p>Social surroundings, s3(2)</p> <p>Refer to section 2.22 above.</p> |
| | s3A | No proposed amendments. | Do not support | <p>"Threshold amount", s3A(3)</p> <p>CME notes that combined with the definition of "material environmental harm" and "serious environmental harm" this is a very low threshold for material or serious harm. This has implications in subsequent sections.</p> <p>This definition uses the monetary amount to indicate the environmental outcome. This is inappropriate and will rarely be a strong correlation particularly once remote locations and logistical costs are considered. For example, a minor hydrocarbon spill (e.g. less than 20L) in to a leach drain that runs below the surface of slab would technically require excavation and removal of a slab (costing well more than \$20,000) if natural attenuation were not permitted. Similarly, a minor effluent spill in to an earthen sump in a remote mine site (e.g. less than 100L) may require mobilisation of a sucker truck from the nearest town which may be several hundred kilometres away also costing well more than \$20,000. Price does not equal environmental outcome and therefore, particularly in remote locations, this is an incredibly low threshold.</p> |
| Part II – Environmental Protection Agency | s7 | EPA Chairman to be either full-time or part-time. | Conditionally support | <p>s7(3)</p> <p>Recommend change "daily newspaper" to "prescribed manner" to contemporise the publication and notification aspects of the Act.</p> <p>s7(4b)</p> <p>The deletion of s7(4b) is supported with the consideration that, in affording this flexibility, the level of service and availability of the EPA should not be limited by the appointment of a part-time Chairperson, as can currently be experienced by CME members engaging with the part-time Deputy Chairperson (as either Acting Chairperson or as nominated delegate due to conflict of interest).</p> |
| | s11 | Meetings of Authority. | Conditionally support | <p>The addition of s11(2A) and 11(4) are supported, however EPA operational procedures must be updated to ensure any decision-making functions conducted remotely or out of session are documented clearly and are valid to avoid legal challenge.</p> <p>s11(2)(a)</p> <p>Recommend confirm definition of "not present" will still hold if meetings are to be done virtually using, for example, teleconference, Skype (etc.)</p> <p>s11(2A) & 11(4)</p> <p>Recommend an alternative term be used instead of "instantaneous". Taking a strict compliance view following the Forrest & Forrest High Court Case, methods like teleconference, Skype, Webex, Teams (etc.) are not technically "instantaneous" and this may result in a legal challenge. CME support the intent of allowing increased flexibility about meeting and reducing travel time, but the definition must be robust and defensible against legal challenge.</p> <p>s11(4)</p> <p>It is unclear why "Authority member" is included in this section when Authority member is covered by 11(2A), and 11(3) refers to persons other than the Authority members. CME recommend a review of this drafting.</p> |

| Part | Section | Description of proposed amendment/s | Position | Response |
|--|---------|---|-----------------------|---|
| | s14A | Decision without meeting. | Conditionally support | <p>The addition of s14A is supported, however EPA operational procedures must be updated to ensure any decision-making functions conducted remotely or out of session are documented clearly and are valid to avoid legal challenge.</p> <p>s14A</p> <p>Recommend this section also makes reference to the Deputy Chairperson in those instances where the Chairperson is absent and hence the Deputy Chairperson is acting as the Chairperson.</p> |
| Part III – Environmental Protection Policies | s26 | No proposed amendments. | Conditionally support | <p>s26(1)(d)</p> <p>Recommend change "daily newspaper" to "prescribed manner" to contemporise the publication and notification aspects of the Act.</p> |
| | s36 | No proposed amendments. | Conditionally support | <p>s36(1)(b)</p> <p>Although there are not many environmental protection policies (EPPs) existing in Western Australia, adherence to the seven-year review appears poor. For example, the <i>Environmental Protection (Kwinana) (Atmospheric Wastes) Policy 1999</i> is well beyond its seven-year review. The Minister did a gazette notice to not review "at this time": http://www.epa.wa.gov.au/sites/default/files/Policies_and_Guidance/Gazette%20Notice%20214%2016%20November%202010.pdf</p> <p>The notice however states that "the Minister may direct the EPA to undertake a review within a period of seven years from the date on which this notice is published". That seven-year period has now lapsed yet there is no further notice not to review nor indication of how a review is then to be initiated.</p> <p>Subsequent reviews / reform of the EP Act should consider how EPPs are used and how they are maintained.</p> |
| Part IV – Environmental Impact Assessment | s38 | Allow a proposal to be referred more than once where the referral of the proposal has been withdrawn (under s38AB or 38A(3)), terminated (under s40A), or revoked (under s47A). | Conditionally support | <p>Refer to section 3.1 above.</p> <p>s38(5j)</p> <p>Reference to s45C(3) requires update as s45C(3) does not exist.</p> <p>Note, it is difficult to assess the potential effect of proposed drafting where sections are incorrectly cross-referenced, and it cannot be deduced what section was intended to be referred to and hence what this clause was to be subjected to.</p> <p>s38(6) (deleted)</p> <p>CME notes the intent of this clause has been largely retained but moved to s39AA. The role of the Minister in s39AA has been changed to the role of the EPA. CME supports this change in role as appropriate.</p> |
| | s38AA | Allow a referred proposal to be amended by the proponent, at the EPA's discretion, prior to an assessment decision being made. | Conditionally support | As this provision applies prior to a decision by the EPA regarding the level of assessment, the proponent's right to amend a proposal prior to any decision-making should not be limited. |
| | s38AB | Allow proponent to withdraw a referred proposal prior to an assessment decision being made. | Support | Support the ability for referred proposals to be withdrawn where a proponent does not wish to proceed. |

| Part | Section | Description of proposed amendment/s | Position | Response |
|------|---------|--|-------------------------------------|--|
| | s38A | <p>Require additional information about a proposal to be provided within a specified time frame.</p> <p>Allow a referred proposal to be withdrawn:</p> <ul style="list-style-type: none"> a) if no response is received within the specified period from the proponent; b) with agreement of the proponent, for a proposal referred by a person other than the proponent. | Do not support as currently drafted | <p>Support the high-level intent of the reform but not as currently drafted.</p> <p>s38A(1)</p> <p>Recommend inclusion of a provision whereby referrals are not invalidated if the requested information is unable to be provided within the specified timeframe. In some instances, given the nature of the requested information, it is not possible or practicable for proponents to provide the information within the specified timeframe. This will particularly be the case if the referral was premature due it being a third-party referral. Also recommend adding "or as otherwise agreed in writing" or similar phrase to allow for circumstances where additional information may take longer to obtain.</p> <p>As an example, it is not uncommon in northern WA to need to re-schedule planned field trips due to cyclonic or other weather events. It is unreasonable for a referred project to be automatically withdrawn or potentially invalidated following legal challenge due to a reasonable delay outside the proponent's control. Where this is the case, referrals should not be invalidated. The wording in s38A(3) is particularly forceful under such circumstances.</p> <p>Recommend rewording or clarifying s38A(3) and well as modifying s38A(1).</p> <p>s38A(2)</p> <p>Non-compliance with the timeframe should not invalidate the referral or the subsequent assessment (where applicable). The request for information timeframe should be set up as a 'stop the clock' mechanism for transparency of process. As currently written, none of the days of the 28 days prior to final receipt 'count'. Consequently, the EPA may spend (for example) 27 days assessing the referral (which is substantial and largely complete) and then on day 28 request a minor additional piece of information thereby fully re-setting and entirely clearing the preceding 27 days spent assessing the substance of the referral. This 'reset' approach is inconsistent with other assessment processes and use of 'stop the clock'.</p> <p>Additionally, in CME's experience, the 28 days is rarely met and there are no consequences for failure to achieve this statutory timeframe.</p> <p>Regarding reference to s39A(3), this reference is incorrect as the section has moved and must be changed to s39A(1).</p> <p>s38A(4)</p> <p>What happens if the proponent does not provide consent? Is the subsequent pathway sufficiently clear in the drafting?</p> |
| | s39A | <p>EPA has discretion to determine which decision-making authorities it will notify of its decision to assess a proposal, allowing the EPA to identify only major decision-makers in relation to an approval.</p> <p>Clarifies that decision to assess (and 28-day statutory timeframe for making a decision on referred proposal) does not apply to Derived Proposals.</p> <p>EPA to take into consideration other statutory decision-making processes.</p> | Conditionally support | <p>CME support the reduction of regulatory duplication afforded by the ability for the EPA to consider the role of other statutory decision-making authorities to regulate the environmental impacts of that proposal. This amendment is particularly relevant to the overlap between the AH Act and the EP Act.</p> <p>Support the EPA to utilise discretion to identify and notify only relevant decision-making authorities (and therefore constraining them from making subsequent decisions).</p> <p>The EPA's operational procedures need to be updated to define how a decision-making authority is determined to be 'relevant' to a referred proposal under s39A(1)(c).</p> |
| | s39AB | The Minister may transfer responsibility for a proposal after a statement that records the implementation agreement or decision has been published. | Conditionally support | <p>s39AB(2)(b)</p> <p>This section appears to provide for the EPA to nominate a responsible person regardless of the nomination from the proponent. Is this the intent and what if the proponent disagrees with the EPA?</p> <p>s39AB(6)</p> <p>This section is circular once you follow through with the Terms defined and other section references. Redrafting is recommended to facilitate understanding and clarity.</p> <p>Regarding reference to s39A(3)(a), this reference is incorrect and must be changed to s39A(1)(a).</p> |
| | s39B | Allow for assessment of strategic proposals, enabling consideration of cumulative environmental impacts on a sub-regional and regional basis. | Conditionally support | Refer to section 3.2 above. |

| Part | Section | Description of proposed amendment/s | Position | Response |
|------|---------|---|-------------------------------------|---|
| | s40 | Clarifies process for referral and assessment of a significant amendment and that the proposed changes are to be assessed in the context of the entire project. | Do not support as currently drafted | <p>s40(1A)</p> <p>CME is concerned with the specific wording of this clause and potential for unintended and unreasonable consequences and subsequent legal challenge / invalidity.</p> <p>This provision is inflexible and does not have regard to the fact that limited environmental data may be available for historically approved projects as information requests for impact assessment always change over time. A recent example where approval for a revised proposal was sought included consideration of subterranean fauna. However, subterranean fauna was not a factor when the original project was approved and there is not data available on the historical subterranean fauna status associated with the original proposal. The proposed amendment opens up an avenue for legal challenge of assessments where consideration of historical impacts is unreasonably difficult or not possible. Importantly, note that previous proposal may pre-date Part IV and pre-date the discovery of certain species and hence knowledge of these is unreasonable (impossible).</p> <p>Further, historical impacts are already taken into account in an impact assessment whereby the environmental baseline describes the current state of the environment and the conservation significance of species and ecological communities. Inclusion of historical impacts in a cumulative impact assessment presents the risk of double-counting these impacts.</p> <p>Recommend change 'must' to 'may' to enable the reasonable application of this provision where it is practicable, significant and of environmental benefit.</p> |
| | s40A | Proponents are able to terminate the assessment of a proposal by written notice. | Support | |
| | s40A(1) | No proposed amendments | Conditionally support | <p>s40A(1)(c)</p> <p>Is it clear that this only holds where the DMA actually has the authority to 'refuse' (versus 'approve') a proposal in a substantive way? It is possible to be a DMA without the DMA having the ability to approve / refuse a proposal (or potentially just a part of a proposal). It may also be possible to amend a proposal to remove a DMA (entirely).</p> |
| | s41 | Where decision-making authorities are constrained from making a decision that allows the proposal to be implemented, this does not apply to an approved proposal if it is an assessment of a 'significant amendment' to an approved proposal. | Conditionally support | <p>s41(3)</p> <p>The incorrect reference to s39A(3)(c) requires update to s39(1)(c).</p> <p>s41(5)</p> <p>The definition in s3(1) for significant amendment is: "significant amendment of an approved proposal means a significant proposal, as defined in s37B, that is or includes the amendment of an "approved proposal".</p> <p>Given that this definition in s3(1) links back to the approved proposal and then includes the amendment, does the drafting of this clause still work (how does it clearly exclude the approved proposal?).</p> <p>Suggest that this is amended to clarify that subsections (2) and (3) only apply to a decision in relation to the significant amendment to the approved proposal.</p> |
| | s41A | A proponent is not constrained from implementing the approved proposal if there is, or will be, an assessment of a 'significant amendment' to the approved proposal, i.e. a Revised Proposal | Conditionally support | <p>s41A(2)</p> <p>This amendment does not make sense as s40A(1)(aa) refers only to the termination of a proposal at the request of the proponent and does not refer to a new proposal referred under s38. Recommend change to "[...] any new proposal referred to the EPA under s8 in place of a proposal terminated under s40(A)(1)(aa)."</p> <p>s41A(4)</p> <p>See comments under s45(5) regarding definition for significant amendment. Suggest that this is amended to clarify that subsections (1) only applies to a decision in relation to the significant amendment to the approved proposal.</p> |
| | s43 | Minister can direct the EPA to assess a project or re-assess a proposal more fully/publicly even if the Minister has dismissed an appeal against a decision not to assess. | Do not support | <p>s43(3A)</p> <p>This amendment appears to leave a trailing risk for not-assessed projects, that can no longer be closed out by Ministerial determination of an appeal. Recommend this amendment be redrafted so that the Ministerial power to direct the EPA to re-assess a proposal is closed out following determination of an appeal against a not-assessed decision.</p> <p>s43(4)(b)</p> <p>Recommend change to "published in a prescribed manner as soon as practicable after the direction is given."</p> |

| Part | Section | Description of proposed amendment/s | Position | Response |
|------|---------|---|-----------------------|---|
| | s43A | <p>Minister may direct EPA to assess or further assess a proposal after the EPA has decided not to assess, and the Minister has upheld the EPA decision following appeal.</p> <p>Streamline the process for amending a proposal during assessment - rather than requiring referral of a new 'revised' proposal in some cases, all changes shall be made under section 43A. If the EPA agrees to a proposed amendment, the EPA shall determine whether it justifies setting a different level of assessment, require further information from the proponent, or further public review.</p> | Conditionally support | <p>Support that the ability for a proponent to request to amend a proposal during assessment is no longer linked to the significance of the amendment. This will reduce regulatory burden and does not increase risk to the environment as the EPA has full flexibility to reject the change, increase the level of assessment, or change the scoping document.</p> <p>The EPA's discretion and powers to give or refuse to give approval for amendments to the proposal during assessment should be proportionate to the proposed amendment. This increased discretion presents a risk that inconsistency could arise in EPA decisions. A right of appeal against the EPA's decision is recommended.</p> |
| | s44 | <p>EPA may take into consideration other statutory decision-making processes.</p> | Support | <p>Strongly support the EPA's consideration of other statutory decision-making processes in their assessment to avoid duplication of regulation in Ministerial Statements and other regulatory instruments.</p> <p>s44(2b)</p> <p>This is the first use of the term "reassessment" (assumed to be referring to if the Minister remits an assessment back to the EPA following an appeal for 'reassessment'). Does 'reassessment' need to be defined or specified? Which of the other sections relates / is relevant to reassessment? If redrafting of Part IV is pursued, perhaps there is a clean / clear way to define or refer to reassessment and make clear which parts of Part IV do and do not apply to a reassessment.</p> <p>s44(3)(b)(ii)</p> <p>Incorrect reference to s39A(3)(c) requires update to s39A(1)(c).</p> |

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| s45 | <p>Requires the Minister and other decision-making authorities to have regard to the outcome of an appeal in making an agreement under s45.</p> <p>The Minister is only required to consult and attempt to reach agreement with those decision-makers relevant to the proposal and its environmental impacts.</p> <p>Specifies the types of implementation conditions that may be imposed, the list is not exhaustive and does not limit the types of conditions imposed.</p> <p>Power to enter into covenants and impose offsets, including monetary contributions to a fund.</p> <p>New requirements covering enforceability of management plans under implementation conditions.</p> | Conditionally support | <p>Support, in principle, the amendments to s45 to allow key DMAs relevant to the proposal and its environmental impacts to be identified and to limit statutory consultation requirements to those key DMAs identified by the Minister. However, previous comments must be considered (see section 2) regarding the definition of DMAs and the introduction of two tiers of DMAs, and either (i) simplification of the definition of a DMA, or (ii) redrafting of s45 be implemented. Current drafting of s45 does not clearly articulate how the two tiers of DMAs (key and non-key) must function when deciding if a proposal may be implemented (see further comments in Appendix II).</p> <p>The intent of streamlining regulatory processes is strongly supported, however it is noted that this provision presents the risk that some DMAs (which may be considered relevant to the proposal) may be actively excluded.</p> <p>s45(1)</p> <p>The term 'assessed proposal' is used in other sections beyond s45. Should be defined as a term used in s3 or else in s37B at the start of Part IV given wider use beyond s45.</p> <p>Support amendments to allow the Minister's appeal decision to not constrain the outcome of the decision-making process.</p> <p>s45(1B)</p> <p>Refer to section 22.1 above.</p> <p>s45(5)(a)(ii)</p> <p>Needs to be updated to specify which subsection of s39A is relevant. Recommend change reference to s39A to s39A(1) and 39A(4).</p> <p>s45(5AA)</p> <p>Support this amendment as it makes it explicit that a Ministerial Statement for a revised proposal can be an amalgamation of previous statements.</p> <p>s45(5A)</p> <p>Requires update to reference to s45AA, s45AA does not exist.</p> <p>s45(5B)</p> <p>Recommend this section is updated to a standalone section as it does not need to sit under s45C. Further, the current wording of s45(5B) implies that the list of implementation conditions is an exclusive list. Recommend reword to "The following list includes things the proponent of the assessed proposal [...]".</p> <p>The presence / absence of a management 'system' is process-focussed not environmental outcome-focussed. It can also be difficult to audit. The focus of conditions should be environmental outcomes. Recommend remove 'environmental management systems'.</p> <p>s45(5B)(a)</p> <p>Do not support including a power to require proponents to 'substantially commence' a proposal within a specified period as it is not reasonable and not necessary for the protection of the environment. Proponents must continue to have flexibility as to whether and when they commence an approved proposal. Such a condition would risk a proponent being in breach of a condition which is an offence under the s47 of the EP Act where it fails to 'substantially commence' a proposal by a date determined by the Minister.</p> <p>There are instances where a proponent may need to delay the commencement of a proposal (including waiting for other regulatory processes).</p> <p>If this proposed amendment is to clarify power to impose a time limit on commencement of an approved proposal as is the current practice, CME recommended the text be reworded and included elsewhere in s47.</p> <p>s45(5B)(c)</p> <p>What happens if the proponent does not have access / authority to the land? Conditions imposed must not be impossible.</p> <p>s45(6)</p> <p>It is CME's understanding that this section has been redrafted as a response to the Yeelirrie court case (WASC34) (see page 13 of the Discussion Paper). Given the court case decision confirmed what was the Minister's decision on the appeal and that the appeal decision does not constrain the outcome of the decision-making process (i.e. the court decision confirmed the State's interpretation and application of the Act was legally robust) it is unclear why this must be re-worded / re-written as it has now been tested and confirmed by the WASC. Redrafting changes the wording and hence means new wording will not have been through the WA Supreme Court so may be challenged afresh.</p> |
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| Part | Section | Description of proposed amendment/s | Position | Response |
|------|---------|---|-----------------------|---|
| | | | | <p>s45(7)</p> <p>Recommend change 'may' to 'must'. This is required to make sure decision-making authorities can progress and make required decisions following notification from the EPA that they are no longer constrained by s41.</p> <p>This provision should be able to be delegated by the Minister to ensure no delays to implementation owing to issues with the Minister's availability.</p> <p>s45(9)</p> <p>Support the unimpeded implementation of an approved proposal where it is decided that a significant amendment to the approved proposal may not be implemented.</p> |
| | s45A | No proposed amendments. | Amendment recommended | Recommend the addition of express powers that s45C and s46 to s46C apply to the notice issued under s45A(2), not just the strategic proposal ministerial statement issued under s45 (i.e. s45C to apply to changes to the description of the derived proposal and s46 to s46C to apply to implementation conditions referred to in the s45A(2) notice). |
| | s45B | If a significant amendment of an approved proposal is referred, implementation conditions relating to the approved proposal continue to apply. | Support | |
| | s45C | <p>Allow Minister to approve minor amendments to proposals.</p> <p>Amendments enable the Minister to require information when a proponent makes a request to change the proposal.</p> | Conditionally support | <p>How provisions under s45C apply to strategic proposals and derived proposals needs to be expressly stated.</p> <p>It is unclear whether this section applies to significant amendments. If so, this needs to be expressly stated. In general, the (assumed) intent of the proposed amendments as described through the Discussion Paper is supported but the drafting in this section is not clear and hence it is unclear if the drafting achieves the aim.</p> <p>Recommend an express power added that allows for the merger / combining of proposals (to result in a single authorisation), a splitting of proposals (to result in two or more authorisations, potentially with different proponents) and a superseding / replacement of proposals (that definitively terminates the previous authorisation). This should extend to enabling these actions in respect of derived proposals, including combining a stand-alone approved proposal with a related derived proposal (for example, for expansion of the project the subject of the stand-alone approval).</p> <p>s45C(1A)</p> <p>This approach needs statutory timeframes and procedures as s45C applications are taking increasingly longer to be assessed. For example, a timeframe for the EPA to decide whether to consider an application under s45C, and timeframes for requests for additional information.</p> <p>How does this section relate (or not) to an amendment that is not significant? Or if an amendment is determined not to be significant (and therefore does not need approval under s45C)?</p> <p>s45C(2)</p> <p>Support the alignment of the test for amendment of conditions with the test currently used in section 45C.</p> <p>Where a proposal has been subject to multiple s45C amendments and/or previously has been the subject of a significant amendment referred under s38, and is consequently substantially different from the original proposal, future amendments which might have a significant detrimental effect on the environment should be reviewed against the last approved revised proposal, not the original proposal. It is therefore recommended that this section be updated to require the review of s45C applications against the Ministerial Statement, rather than the 'proposal as originally approved'.</p> |
| | s46 | Removal of some decision-making authorities from the process of deciding on changes to conditions where those conditions are not relevant to that DMA. | Support | |

| Part | Section | Description of proposed amendment/s | Position | Response |
|------|---------|--|-----------------------|--|
| | s46B | | Conditionally support | <p>s46B(2)</p> <p>Recommend change "[...] a proposed change [...]" to "[...] a proposed amendment [...]".</p> <p>Use of the term 'major change' in reference to amendments to implementation conditions is a relic from previous revisions of the EP Act where amendments were categorised as major or minor. Recommend remove the term 'major change' and update so that it is consistent with the test in s46A(3) and s46C(1A)(b).</p> |
| | s46C | <p>Expands the scope of the minor changes the Minister may make to conditions without EPA inquiry.</p> <p>Changes may be made by the Minister at the request of the proponent where implementation of the proposal under amended conditions will not have a significant detrimental effect on the environment in addition to, or different from, the effect of the proposal under existing conditions.</p> | Support | <p>This amendment removes a compulsory assessment process for a change to conditions irrespective of whether they have environmental implications. The inclusion of a similar test as for s45C regarding whether there are additional or different significant adverse environmental impacts is a practical and well understood test for changes to conditions.</p> |
| | s47A | <p>Allows an implementation agreement or decision to be revoked / expire:</p> <ul style="list-style-type: none"> a) at the end of the grant period; b) where substantial commencement has not occurred prior to the lapse of a specified date as provided by condition; c) in agreement with the proponent. | Conditionally support | <p>Support the general intent of this proposed amendment noting some queries / clarification required.</p> <p>The application to derived proposals needs to be clarified. Would this apply to derived proposals that have been issued a s45A notice (i.e. do the powers to revoke a Ministerial Statement apply to s45A notices)? Conditions of strategic proposal Ministerial Statements, for example, condition 3-1 of MS1105 imposes a time limit for substantial commencement of the derived proposal from issue of the s45A Notice. This does satisfy the test of being "condition mentioned in section 45(5B)(a)", so the revocation power is applicable. Section 47A(4) provides that the Minister may revoke "the implementation agreement or decision". It should be clarified that the revocation is limited to the derived proposal and does not extend to the entire strategic proposal approval.</p> <p>s47A(1)</p> <p>Clarification is required as to how this section does or does not relate / address existing proposals that have passed the period of their substantial commencement (but, for example, may have applied to have it amended / extended but have not yet received this confirmation).</p> <p>s47A(2)</p> <p>Recommend an additional clause to require the CEO to reach agreement with the proponent on the revocation of a Ministerial Statement. CME do not support the Minister's unilateral ability to terminate a Ministerial Statement without the proponent's consent (merely on the basis of the CEO determining that the commencement condition hasn't been met). This is illogical, and unreasonable, and is not consistent with the other termination provisions in the section. It is illogical as the project can't commence in any case until the Minister agrees to amend the Statement to allow for substantial commencement. It is unreasonable as it provides the proponent no say in whether it wishes to maintain the approval (unlike proposed s47A(3)). There are many foreseeable and reasonable factors that can lead to a delay in commencement of a major project (including delays in other statutory processes) and this should not result in unilateral termination of an approval without consent of the proponent.</p> <p>The current s47A proposal is not demonstrably representative of "good" regulatory process or governance in the absence of a strong environmental protection or public resourcing justification (i.e. balancing scarce public resources), of which there appears to be none.</p> <p>s47A(5)(a)</p> <p>As 'to serve' requires receipt of the item it would not be possible to comply in circumstances where the proponent of the proposal or the person that referred the proposal is a natural person that is a deceased person or if a non-natural person, the entity non-longer exists. This would prevent Government from clearing out their historic backlog of unused and unusable proposals. Recommend reword "to be served on" to "to be served on, where reasonably practicable[...]".</p> |

| Part | Section | Description of proposed amendment/s | Position | Response |
|--|--------------|---|--|--|
| | s48 | Allows regulatory agencies, which are not necessarily decision-making authorities for a proposal but have regulatory expertise in a particular environmental matter, to monitor and enforce compliance with proposal implementation conditions. Minister to issue a notice requiring implementation of a proposal to cease for up to 28 days. | Do not support | s48(2a) The addition of regulatory agencies that are not decision-making authorities has the potential to create duplication and confusion for both proponents and within DWER and other regulatory agency. s48(8) Clarity required where notices under s48(4)(a), 48(4)(b), or 48(7) will be published in order to ensure transparency. It is unclear from drafting what is intended for transparency for these notices. |
| | s48AA | New head power to allow fees to be charged for Part IV environmental impact assessment to enable cost recovery. Regulations to be developed in consultation with stakeholders regarding cost modelling. Levy funds to be paid into special purpose account to be used for purposes of administration of Part IV only. | Conditionally support | Refer to section 3.3 above. |
| | s48A to s48J | Allows extension of assessment time where the EPA has sought additional information about a scheme to enable it to make a decision. Brings the assessment of planning schemes in line with those that already exist for assessment of proposals - EPA's assessment report in respect to a scheme must set out the EPA's recommendations as to whether or not it should be implemented, and if so, conditions for implementation. Minister for Environment and Minister for Planning can reach agreement that a scheme may not be implemented. | CME has not reviewed proposed amendments specific to schemes in detail as CME members tend to refer "proposals" not schemes. | |
| Part V – Environmental Regulation | s51B | | Conditionally support | Support, in principle, the objective of ensuring environmentally sensitive areas remain current and relevant. The amendment should clarify that consultation should only be foregone when it has already occurred under another Act. |
| | s51DA | | Conditionally support | Refer to section 4.1 above. |
| | s51E | | Conditionally support | s51E(1) The current drafting may create a Forrest & Forrest issue, as it requires that if the form, fee and supporting information are not all simultaneously received by DWER, the application must be declined by the CEO. Strongly recommend removal of 'accompanied by'. s51E(3) Recommend change 'must' to 'may' to prevent application knock backs / approval validity issues. See above. |

| Part | Section | Description of proposed amendment/s | Position | Response |
|------|---------|---|-----------------------|--|
| | s51F | Clarify the CEO may not make a decision on a clearing permit application which have the effect of leading the proposal down the road of implementation in potential contradiction of EPA advise or Minister's decision. | Conditionally support | Do not object, in principle, to the ability for the Minister to not make a decision on clearing permits until broader implementation decisions have been made, however this may have unintended consequence for related but separate actions. For example, this could preclude a third-party, multi-user infrastructure provider from constructing or modifying an asset (eg: road, rail, port, pipeline) that may interconnect to a network and a different proponent even when the infrastructure asset may be a multi-user asset. s51F(3) and 51F(4) CME is concerned by the broad nature of "related". In a mining context, all infill, near field and brownfield explorations, for example, would be 'related' to assessed proposal(s) and hence so would their fly camps, hydrogeological investigations and potable water source investigations etc. Some of these early works and ancillary works will be able to be multi- or regional use activities which should be allowed to proceed as they are not material to the referred proposal or purely and only linked to the referred proposal but arguable are 'related' to the referred proposal (especially at risk if exploration is for replacement tonnes). The prohibition must be for works that are materially linked not 'related'. |
| | s51I | | Support | Support deletion of the reference to the <i>Soil and Land Conservation Act 1945</i> , and inclusion of related placement provisions as practical changes. |
| | s51M | | Conditionally support | s51M(1) The current drafting may create a Forrest & Forrest issue, as it requires that if the form, fee and supporting information are not all simultaneously received by DWER, the application must be declined by the CEO. Strongly recommend removal of 'accompanied by'. s51M(1B) Recommend change 'must' to 'may'. s51M(7A) CME is concerned by the broad nature of "related". See comments for s51F above. |
| | s51NA | | Conditionally support | A surrender should be specifically contemplated and/or allowed where the land use will be governed by an approval proposal under Part IV. This is to facilitate the reallocation of land clearing where proponents transition from exploration to operations and do not revegetate etc. s51NA(1) The current drafting may create a Forrest & Forrest issue, as it requires that if the form, fee and supporting information are not all simultaneously received by DWER, the application must be declined by the CEO. Strongly recommend removal of 'accompanied by'. |
| | s51R | Use of remotely sensed images as <i>prima facie</i> evidence. | Support | |

| Part | Section | Description of proposed amendment/s | Position | Response |
|------|---------|-------------------------------------|-----------------------|---|
| | s52 | | Conditionally support | <p>Support in principle, however the assessment of the implications of this amendment is impossible without visibility over what is specified by the supporting regulations as being controlled work for the purposes of this definition.</p> <p>“Controlled work”</p> <p>S52(a), (b) and (c) should not all be 'and' statements. It should be one or more so may need to alter above to state “controlled work means one or more of [...]”, or change “and” to “and / or”. The probability that all these situations would arise simultaneously in order to fulfil and 'and' requirement are slim.</p> <p>s52(a)</p> <p>Current drafting is inconsistent with s53(1)(a) and 53(1)(b) which do not allow controlled work or a prescribed activity unless authorised by a licence. To clarify, recommend rewording to:</p> <p>"work at premises that is designed to enable a prescribed activity that is not already authorised by a licence to be carried out at the premises [...]".</p> <p>s52(b)</p> <p>A risk-based approach is needed with regards to what is captured under the definition of controlled works. Controlled works should include works which result in physical modifications to plant bringing about a material or significant increase of existing emissions, and new emissions only. Where ‘controlled work’ will result in a decrease in emissions or discharges then approval should not be required.</p> <p>It is recommended that "designed" be removed from the definition as this implies that design modifications are considered controlled work. Modification of plant design should not be considered controlled work as this can occur frequently with multiple iterations prior to implementation.</p> <p>The phrase 'change the way' is ambiguous and should be removed.</p> <p>The current definition would, for example, include changes designed to reduce or eliminate emissions or improve emissions management below existing licensed activity thresholds.</p> <p>s52(c)</p> <p>Inclusion of 'alteration' in this definition of work would be considered to include plant, equipment or building maintenance which is not reasonable. Strongly recommend rewording this definition to remove consideration of maintenance activities.</p> |

| Part | Section | Description of proposed amendment/s | Position | Response |
|------|-------------|---|-----------------------|--|
| | s53 to s53B | <p>Removal of Works Approvals as a separate instrument, combining with licences.</p> <p>Move to activity-based licensing for Part V rather than premises-based (including to better address mobile plant and equipment).</p> <p>Design and operation of a prescribed activity to be included on single licence.</p> <p>Ability to define a licence area will remain, with flexibility to determine the appropriate area over which a licence and its conditions may extend in each case.</p> <p>Licences allowed to overlap.</p> <p>Voluntary licences - creation of an opt-in system allows a person who carries out an activity that does not meet the threshold for a prescribed activity but wishes to hold a licence to avail themselves of the defences against offences of pollution, or serious or material environmental harm, to apply for and hold a licence.</p> <p>Licences can be granted to a person other than the occupier of the land; 'any person' carrying out a prescribed activity may apply for and hold a licence."</p> | Conditionally support | <p>Refer to section 4.2 above.</p> <p>s53(1)(c)</p> <p>Change 'deal' to 'authorise'. The licence must authorise the carrying out of an activity that would be a prescribed activity if it met the prescribed threshold for a category of activity, to 'deal' does not convey any authority.</p> <p>s53(3)</p> <p>The alternative scenario should also be possible (presumably) that a licence could authorise an activity to occur except in specific premises / areas. For example, a mobile concrete batching plant may be permitted anywhere in WA where it is not an environmentally sensitive area / the land holder has given written permission, and it is not within #m of a residential building etc. Does the drafting allow for this?</p> <p>s53A & 53B</p> <p>For concision, recommend collapse s53A and 53B into one. Controlled works are in relation to a prescribed activity and are anticipated to be regulated on the same licence through staging conditions (i.e. conditions for construction, installation, commissioning, operation and decommissioning). Consequently, a licence for controlled works will inevitably be a licence for prescribed activity (so combine s53A and 53B), and so s54(2)(c) is redundant.</p> |
| | s53C | | Conditionally support | Recommend inclusion of a provision to combine and split licences. |
| | s53D | | Conditionally support | <p>s53D(1)</p> <p>Current drafting may create a Forrest & Forrest issue, as it requires that if the form, fee and supporting information are not all simultaneously received by DWER, the application must be declined by the CEO. Strongly recommend removal of 'accompanied by'.</p> <p>Recommend including a provision to combine and split licences. This will then require consequential amendments to s55(3) as that is drafted as an exclusive list.</p> <p>s53D(3)</p> <p>Change "[...] the CEO must decline to deal with the application and advise the applicant accordingly" to "[...] the CEO may decline to deal with the application, and if the CEO does decline to deal with the application, the CEO must advise the applicant accordingly."</p> |
| | s53E | | Conditionally support | <p>s53E(2)</p> <p>Recommend change 'must' to 'may'.</p> <p>s53E(3)</p> <p>Change 'must' to 'may' due to the link back to s53D(1)(b) and potential invalidity linked to "be accompanied by" and "any information required".</p> |

| Part | Section | Description of proposed amendment/s | Position | Response |
|------|---------|---|-----------------------|---|
| | s54 | Sets out factors to which the CEO must have regard in determining whether to grant or refuse an application. CEO to have regard to planning instruments. | Conditionally support | <p>s54(2)(b)</p> <p>Change 'must' to 'may'. The drafting of this leaves this section clearly open to legal challenge as has been the recent experience under the <i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cwth) (successfully challenged and invalidated). Strongly recommend re-wording.</p> <p>Furthermore, the section should be amended to clarify that it is any development approval or planning instrument to the extent applicable to land on which the controlled work or prescribed activity will be undertaken to which the CEO may have regard. This is consistent with the grounds for revocation or suspension of a licence under s56(2)(f). (This comment also applies in relation to s51O, s55(4)(b), and s60A).</p> <p>s54(b)(ii)</p> <p>Does this mean a Development Application would need to run in parallel to a Part V licence application or prior to?</p> <p>s54(2)(c)</p> <p>Remove as per above comment for s53A and 53B.</p> |
| | s55 | | Conditionally support | <p>s55(3)</p> <p>Recommend include provisions for the amendment of licences by:</p> <ul style="list-style-type: none"> • “combining two or more separate licences” • “splitting a licence” • “adding or removing an additional licensee” <p>Should also consider making this list an 'any one or more / any or all of the following' type of list.</p> <p>For several of the subsections, for example, 55(3)(e), (f) and (h), advertising should not be required. See comment in s56(6)(a) below.</p> <p>s55(4)(b)</p> <p>Recommend change 'must' to 'may'.</p> <p>s55(6)(a)</p> <p>Recommend minor amendments under s55(3)(e), 55(3)(f), and 55(3)(h) to be exempt from publication. Note, there would be nothing to prevent the CEO from publishing these should they so want but publication of these ones appears unnecessary to be a mandatory "must" requirement.</p> |
| | s56 | Allows suspension / revocation of a licence for non-payment of prescribed fees (instead of automatic termination). | Support | |
| | s59 | | Conditionally support | <p>s59(2)</p> <p>Recommend remove as the key consideration should be capability of the transferee. These considerations appear irrelevant to the assessment of whether or not to transfer and definitely should not be a must requirement.</p> |
| | s60 | | Conditionally support | <p>s60(2)</p> <p>Recommend remove as the key consideration should be the fulfillment of compliance obligations. For example, are there any further or remaining necessary controls or remediation that needs to occur that should for example be put on to a closure notice at surrender?</p> |

| Part | Section | Description of proposed amendment/s | Position | Response |
|------|---------|---|-----------------------|---|
| | s60A | | Conditionally support | <p>CME supports, in principle, the intent of this proposed amendment but considers the drafting far too broad and hence impractical / unworkable.</p> <p>CME does not consider that this wording will work for strategic assessments and derived proposals, nor does it work for ancillary related activities such as those associated with exploration (for example, fly camps and their wastewater treatment plants), nor can it work for instances where there are related but separate (and rightly separately and independent) assets such as multi-user rail and port facilities and mine assets within the region. This drafting creates a significant legal challenge risk and must be remedied. Recommend changing this to a discretionary power that can be exercised, and explicitly confirm that this provision does not apply to decisions in respect of licences that are within the boundaries of a strategic proposal that is under assessment.</p> <p>Further clarity is required as to how this links in with strategic assessments given current EPA approach is based on a 'Development Envelope', such that where mobile plant (and a prescribed area around the plant) is regulated by a licence, can the mobile plant prescribed area move outside of the Part IV development envelope?</p> <p>Do not object in principle to the ability for the Minister to not make a decision on licences until broader implementation decisions have been made, however this may have unintended consequence for related, but separate actions. For example, this could preclude Australian Gas Infrastructure Group from constructing the interconnector between Pluto LNG and NWS Project until the NWS Project Extension implementation decision has been made.</p> <p>The current exclusion under s60A(5) applies to a s45C application only. It is recommended to extend these exclusions to s60A(3) and 60A(4) applications when the EPA has consented under s41(5). For example, if there is an existing proposal under s38 then it would still be appropriate to allow for a proponent to seek to amend licences.</p> <p>s60A(2)</p> <p>Question the need to include a transfer. For example, when asset sale occurs, it is necessary at a specific point in time to be able to simultaneously transfer a Part IV as well as a Part V. This prohibition is too broad to be workable in all scenarios.</p> |
| | s60B | | Conditionally support | <p>Clarity required on what is “any approved policy” and whether this refers explicitly and only to EPPs. If not, this is quite broad and may create an issue where a licence is necessarily inconsistent, or a potential challenge opportunity if it is not demonstrated that all policies were considered.</p> |
| | s61 | Clarify the CEO may not make a decision on a licence application which have the effect of leading the proposal down the road of implementation in potential contradiction of EPA advice or Minister's decision. | Conditionally support | <p>Support, in principle, the concept of proponent contributions to environmental monitoring programs as described under proposed Part VIIIB, however the effectiveness of this provision will depend on the consequential arrangement. Therefore, consultation on the regulations and frameworks will be important.</p> <p>s61(1)</p> <p>Current legislation does not contemplate conditions on licence transfers. Recommend change 'transferred' to 'amended' for consistency with section 55(3). Otherwise this would create a new tier of licence being a conditionally transferred licence and the status during the process (or any other matter) is not contemplated in the Act.</p> <p>CME notes that there are broader powers to grant a licence than to amend a licence – is this intentional, and if yes, why? (see s55(3) vs 61(1)).</p> |
| | s61A | Power to impose conditions allowing for staged implementation of a proposal. | Conditionally support | <p>Clear time-based conditions with close-out criteria are needed. Proponent consultation on realistic timeframes for these are needed on a case-by-case basis.</p> <p>s61A(2)(r)</p> <p>The presence / absence of a management 'system' is process-focussed not environmental outcome-focussed. It can also be difficult to audit. The focus of conditions should be environmental outcomes. Recommend remove 'environmental management systems'.</p> <p>s61A(3)</p> <p>Recommend remove as this constitutes a breach of licence condition and is therefore captured under s62 so is unnecessary. It is also poor drafting practice to introduce an entirely new offence provision in to a section of the Act that is not the section where all the related offences are contained.</p> |

| Part | Section | Description of proposed amendment/s | Position | Response |
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| | s63 | A person who carries out an activity on behalf of a licensee, such as an employee or contractor, will also be required to comply with the licence conditions. | Do not support as currently drafted | <p>This section is very broad. There also appears to be an issue here for the person(s) even if they did not know and could not reasonably have known etc. In such instances, they would have committed an offence but may be able to argue for a defence against the offence however it should not be an offence in the first place.</p> <p>This amendment makes sense in the case of contractors or related entities carrying out activities on behalf of the licence holder but extending this personal liability to all employees is not reasonable, particularly as acts of employees would ordinarily be considered to be the act of the holder.</p> <p>s63(1)</p> <p>Why is it necessary to introduce a new term 'licensed action' just for this one section on offences? This seems to unnecessarily complicate the drafting.</p> |
| | s74A | Narrows scope of the defence offered by licence to an offence involving pollution, an emission or the discharging / abandoning of waste where the licence expressly authorised the emission / waste, and any limits on that emission / discharge imposed by the conditions of the licenced have been complied with. | Do not support | Refer to section 4.3 above. |
| | s74E | | Conditionally support | <p>s74E(2)(b)</p> <p>Recommend remove subsection (b). There should be no timeframe until a summons is issued.</p> |
| Part VB – Environmental protection covenants | s86H – s86R | <p>A condition of an EP Act approval may require a person to enter into, or arrange for another person to enter into, an environmental protection covenant, enforceable under the Act.</p> <p>Covenants may be either in perpetuity or for a specified period, may contain positive or negative obligations, and may be amended.</p> <p>Open to appeal.</p> | Conditionally support | <p>Support, in principle, the implementation of environmental protection covenants.</p> <p>s86M(2)</p> <p>The current drafting may create a Forrest & Forrest issue, as it requires that if the form, fee and supporting information are not all simultaneously received by DWER, the application must be declined by the CEO. Strongly recommend removal of 'accompanied by'.</p> |
| Part VI – Enforcement | s89A | <p>Power for inspectors to use reasonable force to enforce the EP Act where there are reasonable grounds to suspect non-compliance.</p> <p>Reasonable force only to be used against property.</p> <p>CEO consent required where reasonable force likely to result in significant damage.</p> | Conditionally support | <p>Refer to section 5.1 above.</p> <p>s89A(4)(a)</p> <p>Current drafting provides that a person assisting an inspector has all of the powers as an inspector, not simply those which are being exercised by the inspector at the time the person is assisting. By definition an assisting person should only have the same powers exercised by the inspector at the time the person is assisting, and any powers must be further limited to those that are necessary in order to do the specific assistance required. Recommend change 'conferred on' to 'exercised by' and 'necessary in order to assist in that instance'.</p> |

| Part | Section | Description of proposed amendment/s | Position | Response |
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| | s90 | Provides inspector with the power to require persons to produce books & other sources of information relating to an emission, or manufacture, sale or distribution for sale of prescribed equipment / material. Does not apply to information relating to environmental harm, clearing, and other potential breaches not involving an emission. Allows an inspector to require a person to attend an interview and answer questions. Allows an inspector to record an interview by electronic means. | Conditionally support | The status of the privilege against self-incrimination should be clarified. If the person is compelled to answer, then the answer should not be able to be used against them (per the MSIA). The person should be entitled to be accompanied by a person of their choosing, including by a person who is legally qualified. If the interview is recorded in writing or electronically, a copy must be provided to the person as soon as practicable after the interview. |
| | s93 | No proposed changes. | Conditionally support | Further clarity needed on how this section will interact with the requirements of the MSIA. Mine site personnel may be exercising their requirements and duties under the MSIA and this may not always align with what a police officer, inspector or authorised person request, or may cause a delay etc. For example, mine site personnel may refuse and obstruct entry inside a blast zone due to a loaded and imminent shot. It will not always be the case that police officers, inspectors and authorised persons will be familiar with hazards associated with the resources sector, nor may they be familiar with the MSIA. |
| | s99A | Modified penalties to apply to all Tier 2 offences, and non-intentional Tier 1 offences. CEO required to consider the potential, or actual, environmental impact of any conduct giving rise to the alleged offence. CEO to consider each of the criteria listed in s99A(1)(c)-(f), rather than requiring each criterion to be met. | Conditionally support | CME has concerns with the proposed amendments. It does not appear that the CEO needs to lay out concerns to an evidentiary standard for modified penalties which, combined with the low threshold and changes to licences to, for example, require express listing of all emissions, may create issues. It will be disproportionately expensive to challenge matters given the severity of the penalty and reputational impact of the penalty which may in fact be for an immaterial matter due to the low threshold. |
| | s99J | Infringement notices to be served within 12 months after the day on which the alleged offence is believed to have been committed. | Conditionally support | s99J(3) Increasing from 35 days to 12 months is a large increase. Confirmation on the rationale for this change is needed. Timely resolution is preferable. |
| Part VII – Appeals | s100 | | Conditionally support | A review should be undertaken of the new / amended provisions to ensure that appeal rights are provided for where appropriate. Refer to section Part VII – Appeals above. s100(3a)(e) Recommend move section to under section 100(3) for concision. Recommend change '14 days' to '21 days' for consistency with amendments to sections 100(3a)(a), 100(3a)(b) and 100(3a)(c). s100(4) Recommend change '14 days' to '21 days' for consistency with amendments to sections 100(3a)(a), 100(3a)(b) and 100(3a)(c). |
| | s101 | Removal of provision for prevention of implementation / continuation of implementation where an appeal has been lodged by the proponent against implementation conditions changed following an EPA inquiry. | Support | Support amendment to s101(3) as an acknowledgement that appeals on conditions can only be made by proponents and would generally be to clarify or streamline requirements rather than increase environmental management. Therefore, there is low environmental risk in the proponent implementing the proposal under the published conditions while the appeal decision is pending. This removes a potential roadblock for proposal commencement. s101(1) Recommend provide Minister express power to uphold an appeal. |

| Part | Section | Description of proposed amendment/s | Position | Response |
|--|---------------|---|-----------------------|--|
| | s106 | Clarifies the Appeals Convenor is not required to report to the Minister where a committee has been appointed under s106(2) and will report to the Minister. Requires Appeals Convenor to consider submissions received by the Minister from a decision-making authority and appeals committee (where one has been appointed). | Support | |
| | s107 | Removal of provision for the Minister to make a final decision on appeal without receiving or considering a report from the Appeals Convenor or appeal committee. | Support | |
| | s107B | Enable appeals to be lodged with the Appeals Convenor to improve administrative efficiency. | Support | |
| Part VIIB – Environmental monitoring programmes | s110K – s110Y | Require industry to contribute financially to the environmental monitoring programs in industrial hubs across the State. Introduce head power for implementing environmental monitoring programs. Establish an Environmental Monitoring Fund. | Conditionally support | <p>Support, in principle, industries' financial contribution to environmental monitoring programs (EMPs) in industrial hubs, however more detail is required on the framework for implementation. CME members look forward to detailed consultation on the Regulations. These Regulations should:</p> <ul style="list-style-type: none"> Require the program to comply with relevant standards in relation to monitoring and sampling methodology and equipment. Detail interactions between the EMP and Part V licensing. Regarding land access, require DWER to enter into an agreement with the landowner on access to install, maintain and decommission monitoring equipment. Require DWER to analyse and utilise the data in a timely manner to inform standards, guidance and / or policy development. <p>Any EMP proposed should be of State significance. CME recommend the establishment of new EMPs be by agreement with the CEO and proponents, or otherwise at the decision of the CEO with proponent rights of appeal, with a test to demonstrate the EMP is of State and/or strategic significance. Wherever practicable, methods and equipment which have the potential to invalidate historical datasets should not be used, and, prior to implementation, a process must be determined for data integration and precedence.</p> <p>Consultation with industry on funding arrangements is required. Where the 'polluter pays' principle is applied, the determination of funding allocations should be transparent, based on publicly available data, and re-assessed annually.</p> <p>Under Division 3, there should be an ability for the CEO to assess the cost of a proposed EMP and the appropriateness of the related levies in respect of the EMP's perceived State and / or strategic significance.</p> <p>To avoid potential double-counting, a proponent's involvement in an EMP should be taken into account by the EPA in their recommendation of proposed conditions requiring offsets.</p> <p>s110L(f)</p> <p>Further detail is required as to the require content of the report and frequency of publication. For transparency, the report should be made publicly available.</p> <p>s110P(1)</p> <p>Can you please confirm from where the 20% rate is derived?</p> <p>s100R(1)</p> <p>Please confirm, does this mean if you are one day late paying an instalment, you are then automatically due all other remaining instalments plus a fine of \$10,000 plus treble the total amount of all instalments? This seems like a disproportionate penalty for being a day late on an instalment.</p> |

| Part | Section | Description of proposed amendment/s | Position | Response |
|--|------------------------|--|-----------------------|--|
| Part IXA – Bilateral agreements with the Commonwealth | s124A – s124H | Ensure the State Government's ability to fully implement bilateral agreements. Function of the EPA, Minister for Environment and CEO of DWER to promote implementation of a bilateral agreement or take into account any guidelines / policies established under a bilateral agreement. Fees to be charged - clearing permit processes and Part IV duties (processing referrals, undertaking assessments, approving management plans). | Support | Refer to section Part IXA – Bilateral agreements with the Commonwealth above. |
| Part IX – Transitional | s133A – s133Q | | Conditionally support | Transitional arrangements must include provisions for the maintenance of existing registrations under Part V and other such instruments and orders. s133D(1) Remove reference to s73C(2) as this section does not exist, recommend change 'section 73C(2)' to 'section 99ZC(2)'. s133D(3) Remove reference to s73C(3) as this section does not exist, recommend change 'section 73C(3)' to 'section 99ZC(3)'. |
| Schedule 2 – Matters in respect of which regulations may be made | cl.5A | Introduction of head powers for the certification of environmental professionals, and the requirement of documents submitted under the Act to be certified by an accredited practitioner. | Do not support | Refer to section 8.1 above. |
| | cl.26 – 26A | Schedule 1 of EP Regulations to prescribe activity and threshold level. | Conditionally support | Schedule 1 of the EP Regulations review should be issued for consultation in parallel with the EP Act Amendments final Bill. The implications for changes in threshold quantities need to be considered. |
| Schedule 6 – Clearing for which a clearing permit is not required | cl.1, 10, 11A, 15 & 16 | Exemption for clearing refers to clearing that is done to give effect to a requirement to clear under prescribed written law, specifically listing the legislation to which the exemption applies. | Conditionally support | This exemption relies on prescribed exemption lists (new Schedule to the EP Regulations, Schedule 6 in the EP Act) rather than the more flexible 'under a written law' exemption. If so, lists in themselves may not cover all circumstances or legislation yet to be enacted. The list must be made available as soon as possible (and in line with the timing of the final Bill) to ensure that no exemptions currently in place will inadvertently be lost due to poor drafting or oversight. |
| Various | | Minor amendments to address a range of administrative inflexibility and inefficiencies throughout the EP Act. | Conditionally support | Support, in principle, amendments to address administrative inflexibility and inefficiencies. |

| Part | Section | Description of proposed amendment/s | Position | Response |
|--|---------|---|-----------------------|---|
| | | <p>Modernise requirements for advertising, publishing and confidentiality:</p> <ul style="list-style-type: none"> a) Ensure consistency between advertising and publishing requirements. b) Providing for use of alternative means of publishing (e.g. internet). c) Prescribe further types of information and documents that must be published. d) Confidentiality test under s39 removed, criteria to apply to the entire EP Act. e) Process for request for exemption from publishing. f) Application of prescribed copyright requirements to any documents submitted under the EP Act. | Support | <p>Confidentiality is considered important. Support the modernisation of advertising and publishing requirements, and the broader application of confidentiality claims to the whole of the EP Act.</p> <p>Concerns exist regarding the proposal to allow regulations to prescribe further types of information and documents that must be published. Consultation on these regulations and what documents may be included is needed.</p> |
| Further issues for consideration | | | | |
| New ideas | | Include new provisions under the EP Act to ban certain products or product classes. | Do not support | Insufficient detail as to what these provisions could extend to, or how banned products could be added. Further, this would seem a duplication of regulations already existing. For example, the State has recently instigated a ban on light weight plastic bags and this did not require any Act amendments in order to take effect. The State should not seek to amend an Act where this is unnecessary to achieve a policy objective. |
| | | Resources provided for third party and community participation in environmental impact assessment and environmental regulation. | Do not support | Insufficient detail as to how this would be funded, what would be the scope (whether it would be just for advice or via comments in the approvals processes), and the definition of roles. |
| | | DWER administers funds in some areas as a result of approvals under the EP Act but there are no specific head powers or hypothecation of the funds specifically provided for under the EP Act. | Support | Support the provision of head powers for DWER's administration of funds acquired as a result of approvals under the EP Act. For example, this may assist with the management of biodiversity offset funds and ensuring that any interest accrued due to this fund is available for biodiversity offsets and administration of the fund rather than channelled back in to the Consolidated Accounts. |
| Delegations | | Clearly control any delegation of decision-making to non-environmental agencies or officers, to ensue these powers are exercised to protect the environment. | Conditionally support | Clarification is needed regarding what is meant by 'clearly control' the delegation of decision-making. |
| Role of the Environmental Protection Authority | | Require the EP Act to prepare and publish its policies on environmental impact assessment and environmental protection in a manner consistent with the objects and principles of the Act, and ensure that these published policies are mandatory considerations. | Do not support | Only Regulations and Acts should be mandatory. Due to the different standing of Acts and Regulations, these go through the parliamentary review process and managed in a manner that supports their mandatory nature. EPA policies are not the same as an Act or a Regulation. Part III of the EP Act is available should a situation arise in the future that warrants a Policy of this nature which will therefore ensure it goes through a robust parliamentary process. |
| | | Part 2 should include eligibility criteria for the appointment of EPA Board members as a schedule to the EP Act, which is developed following public and professional consultation. | Do not support | Support the current process, eligibility criteria for public servants already exist. In the absence of understanding the problem this is trying to solve, recommend current Act with amendments already covers this and therefore no further amendments are justified. |

| Part | Section | Description of proposed amendment/s | Position | Response |
|-----------------------------------|---------|---|---|---|
| | | Remove duplication issues between the EP Act and the <i>Heritage Act 2018</i> [sic]. The EPA is not the best entity to assess heritage or culture. | Conditionally support | Support the specific exclusion of heritage as a consideration for social surroundings on the basis that it is covered by the AH Act and best managed under the AH Act. |
| Environmental Protection Policies | | Section 33 of the EP Act be amended to require public input into the EPA's advice to the Minister on the revocation of any existing environmental protection policy. | Do not support | Parliamentary and public consultation processes already exist around Part III. Further consultation requirements are not considered necessary. |
| | | Parliamentary approval should also be required to validate the Minister's decision as in the case for any new environmental protection policy. | Do not support | Support Ministerial discretion. |
| | | Revise Part III to facilitate the broader adoption of environmental protection policies. | Conditionally support | Support, in principle, if aligned with objects of the Act. CME notes there are only limited EPPs currently (suggesting they are of limited use or an unfavoured tool). There are also issues regarding the seven (7) year review cycle for existing EPPs. |
| Assessment | | The EP Act be amended so that the EPA's criteria for determining significance are contained in the body of the Act rather than in the separate administrative procedures. | Do not support | Do not support narrowing definition of 'significance' as the definition is expected to evolve over time and undermines the case-by-case assessment approach. |
| | | Section 38A of the EP Act be amended to make it mandatory for the EPA to explicitly consider and report on the cumulative impacts of every proposal it receives. | Do not support | Do not support the mandatory consideration of cumulative impacts of all proposals, each proposal should be assessed on merit. Approved proposals may never be implemented in their entirety, and so cumulative assessment may be inherently overly conservative. Cumulative impacts can be insignificant. Further, the potential exists for best practice (and beyond) operators to be disadvantaged by operators with poor practices. |
| | | Section 44(3) be amended to clarify that the government may not request or direct the EPA to alter the content of any of its reports prior to publication. | Do not support | Decision-making authorities should be unfettered in providing advice to the EPA. The EPA still has the ability to make its own determination on what to include. |
| | | A review of section 48A of the EP Act be undertaken, together with an amendment of the regulations requiring the EPA to seek public comment on the content of its assessment of planning schemes. | This is specific to a scheme, and therefore has not been considered by CME. | |
| | | The current separation applied to planning schemes in the EP Act should be removed, and these should be subject to Part IV in the same way as other significant proposals. | This is specific to a scheme, and therefore has not been considered by CME. | |
| | | A confidential peer review process be introduced as a requirement of the EP Act to assess environmental review documents prepared by proponents, similar to the process used for academic publications, with costs recovered. | Do not support | Do not support making any aspect of the assessment process confidential (with the exception of the existing commercial confidentiality provisions), as this would decrease the transparency of the assessment process. This may also limit procedural fairness and natural justice. |
| | | Broader powers for strategic assessments to allow cumulative impacts to be more fully considered and regionally important environmental values protected. | Conditionally support | Properly applied cumulative impacts should be considered in strategic assessments i.e. before the activity has taken place. Further information on what is proposed is needed in order to fully assess this proposal. |

| Part | Section | Description of proposed amendment/s | Position | Response |
|------------------------|---------|---|-----------------------|---|
| Decision-making | | The EP Act be amended to require decisions made under Parts III, IV and V give effect to the objects and principles as contained in section 4A. | Do not support | These principles are considerations but cannot be given effect in all proposals. For example, how much evidence would be required to overcome the precautionary principle. This would undoubtedly create a significant administrative burden for the regulator with limited difference in environmental outcome as the risk-based approach already applied through EPA and DWER processes focuses on the objects of relevance to the specifics of the proposal. |
| | | Include statutory criteria for decision-makers to have regard to when making decisions under the EP Act. | Do not support | Further detail is required on this proposal before it can be fully assessed. This is likely to create an additional administrative burden that may be excessive and is unlikely to alter the environmental outcomes. Additionally, this would create a potential new grounds for legal challenge. |
| | | Require all decision-makers under the Act to provide written reasons where requested. | Conditionally support | CME supports transparency and clarity around decision-making processes. Further information is required on this proposal before it can be fully assessed. |
| | | Add statutory criteria for recommendations by the EPA as to whether a proposal may be implemented. | Do not support | Further detail is required on this proposal before it can be fully assessed. This is likely to create an additional administrative burden that may be excessive and is unlikely to alter the environmental outcomes. Additionally, this would create a potential new grounds for legal challenge. |
| | | Section 46 of the EP Act be amended to allow the Minister to revoke an environmental approval if new evidence about the potential for significant environmental harm becomes available. | Do not support | Sufficient powers already exist under Part V for the management and mitigation of environmental harm. |
| | | The power to amend works approvals, licences, land clearing permits or implementation agreements or decisions should be limited to administrative changes. Any substantive changes to such approvals should be subject to robust environmental assessment conditions. | Do not support | Proposed amendments to the EP Act already cover this such that significant amendments are subject to review. |
| | | Require that any significant amendment of implementation conditions be assessed by the EPA at the same level of public consultation as occurred when the original proposal was assessed. | Do not support | Good drafting is required for implementation conditions to avoid the need for significant amendment. Furthermore, the scope of change of conditions is typically more focussed than the original proposal and would therefore not warrant an equivalent level of consultation. This recommendation negates proposed changes under s46C(1A). Each submission should be assessed on its own merits. |
| | | 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. | Conditionally support | Support, in principle. Further information required. |
| | | Clarify how the time limit for implementation of a proposal works. | Support | Support further clarity on the definition of substantial commencement, and whether the five-year substantial commencement timeframe is extended upon DWER's receipt of an application to extend within the five-year period, or otherwise their approval of the application. |
| | | Additional post approval administrative powers that could enable multiple Ministerial Statements to be rolled into one, or conversely to split a proposal into two or more Ministerial Statements. | Support | Strongly recommend inclusion of express powers to supersede, combine and/or split Ministerial Statements. This amendment would provide commercial flexibility to split projects and change proponent. Further, this should also include a mechanism to allow Derived Proposals to be superseded, combined and/or split. |
| | | Clarification in respect to derived proposals, including that they are subject to a Ministerial Statement. | Conditionally support | Support further clarity on derived proposals. Further information required. |

| Part | Section | Description of proposed amendment/s | Position | Response |
|--------------------------------------|---------|---|-----------------------|--|
| | | Clarify revised proposal provisions, including constraints to decision-making and implementation. | Conditionally support | Support, in principle. Further information required. |
| | | Where the EPA relies on other regulators to achieve its environmental objectives, it must verify and substantiate the level of environmental protection achieved through such third parties. It also must not have the effect of diminishing community and third-party participation through reductions in transparency, consultation or appeal rights. | Conditionally support | Support, in principle, providing it does not preclude removal of regulatory duplication. Further information required. |
| | | DWER and EPA to not make decisions or allow activities that are inconsistent with Recovery Plans under the Biodiversity Conservation Act or EPBC Act, or which would result in increasing threat to a listed species or habitat or increase a threatening process. | Conditionally support | Support to the extent that this doesn't extend past these requirements. Proponents are already required to meet other regulatory requirements. Further information required. |
| Offsets | | The EPA's policies and guidelines be amended to regulate and minimise the use of offsets and make explicit the circumstances under which they can be applied. | Conditionally support | A single national scheme for the creation, use and trade of offsets is supported. Further information is required as to how state and federal offsets can work together. The State has already initiated (nearly completed) a review in to offsets policies, the findings of which are expected to better inform a position on this recommendation. |
| Clearing of native vegetation | | The clearing provisions should be moved to a standalone part of the Act to ensure that the specific protection of native vegetation and biodiversity conservation is the focus of regulation (rather than pollution and environmental harm). | Do not object | It is unclear how this would alter environmental outcomes so unclear on need for this reform but do not object. |
| | | Alternatively, a purpose-specific native vegetation Act could be developed to regulate the clearing of native vegetation and to provide for arrangements relating to carbon farming. | Do not support | Do not support additional regulation. This would only add another layer of regulatory complexity without necessarily improving native vegetation protections. Any modifications should be made within the constructs of the EP Act. Native vegetation clearing is intimately linked to biodiversity outcomes so it would seem impractical to separate native vegetation clearing from other flora and fauna (etc.) considerations. It is common for multiple interlinked environmental factors to necessarily be considered as part of the overall environmental impact assessment for a significant proposal so separation in to multiple different Acts would be unhelpful and prevent holistic review. It is unclear how separation of clearing in to an entirely new Act would improve environmental outcomes (as opposed to just create more administrative burden and red tape). |
| | | Reform of the clearing provisions in Part V and in supporting regulations is necessary to avert continued degradation of native vegetation across the State, particularly in highly cleared areas such as the Wheatbelt and the Perth and Bunbury metropolitan areas. | Conditionally support | Further information required. Native Vegetation in WA review is currently underway, the findings of which are expected to better inform a position on this recommendation. |
| | | Areas of reform should include exemptions, principles and definitions applying to clearing. | Conditionally support | Further information required. Native Vegetation in WA review is currently underway, the findings of which are expected to better inform a position on this recommendation. |
| Industry regulation | | Include a power to license mobile plant and equipment. | Support | This recommendation is covered in proposed amendments to Part V. See comments above. (Hence it is unclear what further amendments beyond that already identified are needed to enable this outcome.) |

| Part | Section | Description of proposed amendment/s | Position | Response |
|--------------------------------------|---------|--|----------------|--|
| Compliance and enforcement | | The amended EP Act should require financial assurances to be imposed on all approvals under the EP Act. This is necessary to protect against environmental impacts and to address financial risks to the Government. | Do not support | Financial assurances should only be applied where commensurate with the impact / risk. This provision is already in place under the <i>Mining Act 1978</i> and such an amendment would represent an unreasonable duplication in this regard. Additionally, where lands are not subject to the provisions of the <i>Mining Act 1978</i> , the EPA already has the powers to recommend assurances through the EPA processes and the Minister already does in such circumstances enforce these through Ministerial Statements. |
| | | Modernise enforcement options including review of the offences and defences, consideration should be given to introducing civil penalties and civil remedies and the option of third-party enforcement. | Do not support | Support, in principle, the modernisation of enforcement options, however do not support third-party enforcement. Third-party enforcement was suggested at one stage for the new Workplace Health and Safety legislation and was staunchly opposed because it would undermine the role of the government regulator. CME support ensuring that the government regulator is adequately resourced to enforce the Act and does so in accordance with clear and transparent enforcement policies. Further information is required regarding the introduction of civil penalties and civil remedies. |
| | | The funding arrangements for the EPA be reviewed to ensure that the auditing and compliance is able to be carried out effectively. | Do not support | Proposed amendments to the EP Act already include cost recovery for Part IV. Part V licensing fees cover compliance and enforcement activities for operations. |
| Appeals | | The current structure of Part VII is currently not optimal in terms of clarity and logic, which is in large part due to the initial drafting of this Part and also due to numerous sets of Part VII amendments made from 1994 to 2010. It is recommended that it be restructured to streamline and modernise the format, reduce duplication, and clarify intent. | Support | Support redrafting of Part VII. Consideration should also be given to prescribing timeframes for finalising appeals. The uncertainty created by having appeals pending for significant periods of time is not in the interests of any party, particularly where the appeal outcome may impact the viability of a significant capital project or expansion. |
| | | Third party appeals should be allowed against decisions to not assess proposals; decisions not to assess schemes, decisions on whether to implement proposals (not only conditions), decisions on works approvals and licences (not only conditions). | Do not support | The purpose of an independent body is to provide objective, expert advice. Additional third-party appeal only serves to increase regulatory burden. |
| Other recommendations | | | | |
| Gendered language | | Recommend transition towards gender-neutral language throughout the EP Act (e.g. change 'his' and 'Chairman' to 'his or her' and 'Chairperson'), as noted in comments in Appendix II: Detailed Comments and Responses on the Exposure Draft Bill. | | |
| Numbering / sequence | | The sequence / numbering of sections and Parts (AA, AB, A, BA, etc) is inconsistent. For example, sequence of s38 to s38A (s38, s38AA, s38AB, s38A) differs from sequence of s39 to s39B (s39, s39A, s39AA, s39AB, s39B). Recommend review numbering / sequence of sections and Parts for consistency. | | |
| Contemporise language (shall v must) | | Recommend the contemporisation of language throughout the EP Act, including updating "shall" to "must". | | |
| Cost recovery mechanism | | Where reference is made to the Consolidated Account, recommend update cost recovery mechanism. | | |

Appendix II: Detailed Comments and Responses on the Exposure Draft Bill

Environmental Protection Amendment Bill 2019

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Change 'Chairman' to 'Chairperson' or 'Chair'
Change throughout

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Western Australia

LEGISLATIVE ASSEMBLY/COUNCIL

Environmental Protection Amendment Bill 2019

A Bill for

**An Act to amend the *Environmental Protection Act 1986* and to
consequentially amend other Acts.**

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title


This is the *Environmental Protection Amendment Act 2019*.

2. Commencement

This Act comes into operation as follows —

- (a) Part 1 — on the day on which this Act receives the Royal Assent;
- (b) sections **1** and XX — on a day fixed by proclamation;
- (c) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020
10:35:24 AM

Update

Part 2 — *Environmental Protection Act 1986* amended

3. Act amended

This Part amends the *Environmental Protection Act 1986*.

[The following text is the Environmental Protection Act 1986 showing proposed amendments in track changes. A formal amending instrument will be drafted at a later stage.]

Part I — Preliminary

1. Short title

This Act may be cited as the *Environmental Protection Act 1986*¹.

2. Commencement

The provisions of this Act shall come into operation on such day as is, or days as are respectively, fixed by proclamation¹.

3. Terms used

- (1) In this Act, unless the contrary intention appears —

analysis means a test or examination of any matter, substance or process for the purpose of determining its composition or qualities or its effect (whether physical, chemical or biological) on any portion of the environment, or examination of emissions or recordings of noise to determine the level or other characteristics of noise or its effects on any portion of the environment;

analyst means an analyst appointed under section 94;

appeals committee means an appeals committee appointed under section 45(3) or 106;

Appeals Convenor means the Appeals Convenor appointed under section 107A;

s. 3

~~*applicant*, in relation to an application for a works approval or licence, means the person applying for the works approval or licence;~~

approved policy means a draft policy approved under section 31(d);

approved proposal means a proposal the implementation of which is authorised under an implementation agreement or decision set out in a statement served under section **1**(5(a));

assessed scheme —

- (a) means a scheme which has been assessed under Division 3 of Part IV and in respect of which a statement has been delivered to the responsible authority under section 48F(2)(a);
- (b) for the purposes of Part IV, includes a scheme —
 - (i) in respect of which the responsible authority has been informed under section 48A(1)(a); or
 - (ii) in respect of which the responsible authority has not been informed under section 48A(1)(a), (b) or (c) within 28 days after the referral of that scheme to the Authority under the relevant scheme Act; or
 - (iii) which is a local planning scheme, or an amendment to a local planning scheme, in respect of which sections 124, 125, 126 or 128 of the *Planning and Development Act 2005* have been complied with to the extent, if any, necessary in relation to a region planning scheme, or an amendment to a region planning scheme, which amendment or scheme is a scheme referred to in paragraph (a) or subparagraph (i) or (ii); or
 - (iv) which is a local planning scheme or a region planning scheme, or an amendment to a local planning scheme or a region planning scheme, amended under the *Planning and Development*

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Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020
11:55:39 AM

Typing mistake.

Change to 45(5)(a)

Act 2005 section 122J or 122K to the extent, if any, necessary in relation to an improvement scheme, or an amendment to an improvement scheme, which amendment or scheme is a scheme referred to in paragraph (a) or subparagraph (i) or (ii);

- (c) does not include a scheme in respect of which the responsible authority has been advised under section 48A(2)(b);

authorised person means a person or member of a class of persons appointed under section 87(1), and includes the CEO;

Authority means the Environmental Protection Authority continued in existence by section 7(1);

Authority member means a person for the time being holding office as a member of the Authority under section 7 and includes the **1** chairman and Deputy **2** chairman;

beneficial use means a use of the environment, or of any portion thereof, which is —


- (a) conducive to public benefit, public amenity, public safety, public health or aesthetic enjoyment and which requires protection from the effects of emissions or of activities referred to in paragraph (a) or (b) of the definition of **environmental harm** in section 3A(2); or
- (b) identified and declared under section 35(2) to be a beneficial use to be protected under an approved policy;

~~**bilateral agreement** means an agreement referred to in section 45(2) of the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth to which the State is a party;~~


books, without limiting the generality of the definition of **book** in section 3 of the *Interpretation Act 1984*, includes —

- (a) any register or other record of information; and
- (b) any accounts or accounting records,

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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020
10:36:39 AM

Change 'Chairman' to 'Chairperson' or 'Chair'

 Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020
10:36:54 AM

Change 'Chairman' to 'Chairperson' or 'Chair'

s. 3

however compiled, recorded or stored, and also includes any document;

CEO means the chief executive officer of the Department;

1 chairman means the Authority member appointed to be

2 chairman of the Authority under section 7(4a);

clearing has the meaning given by section 51A;

clearing permit means a clearing permit granted and in force under Part V Division 2;

closure notice has the meaning given by section 68A;

committee of inquiry means a committee of inquiry appointed under section 29(1);

Commonwealth Environment Act means the *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth);

condition includes a restriction or limitation;

contaminated has the same meaning as it has in the *Contaminated Sites Act 2003*;

contaminated sites auditor means a person accredited as a contaminated sites auditor under the *Contaminated Sites Act 2003*;

controlled work has the meaning given in section 52;

corporation has the meaning given in the *Corporations Act 2001* (Commonwealth) section 57A;

decision-making authority, in relation to a proposal, means a public authority empowered by or under —

(a) a written law; or

(b) any agreement —

(i) to which the State is a party; and

(ii) which is ratified or approved by an Act,

to make a **3 cision** in respect of ~~any~~ the proposal and, in Division 2 of Part IV, includes, in relation to a particular proposal, any Minister prescribed for the purposes of this definition as being the Minister responsible for that proposal;

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Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020 10:37:41 AM

Change 'Chairman' to 'Chairperson' or 'Chair'

Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020 10:38:05 AM

Change 'Chairman' to 'Chairperson' or 'Chair'

Number: 3 Author: CME WA Subject: Highlight Date: 17/01/2020 10:43:47 AM

Do not support the introduction of two tiers of decision-making authorities (DMAs). The proposal to define key and non-key DMAs with the introduction of key DMAs (under s45) does not achieve the objective of improving the accuracy of determining relevant DMAs for proposals, or significant amendments to approved proposals, but rather adds another layer of complexity to the determination of a DMA which amendments to s45 do not clearly or fully articulate.

Recommend either:

(i) Simplify the two tiers of DMAs (key and non-key DMAs) into a single, updated definition of a DMA (under s3), narrowing a DMA to only be those with some form of major role in making decisions (so as to make the key DMA concept be the actual DMAs only). All other relevant public authorities and Ministers can still be stakeholders that are consulted, informed or similar through administrative or other processes. Consequential amendments will be required throughout the Act. Or,

Comments from page 22 continued
on next page

s. 3

however compiled, recorded or stored, and also includes any document;

CEO means the chief executive officer of the Department;

Chairman means the Authority member appointed to be Chairman of the Authority under section 7(4a);

clearing has the meaning given by section 51A;

clearing permit means a clearing permit granted and in force under Part V Division 2;

closure notice has the meaning given by section 68A;

committee of inquiry means a committee of inquiry appointed under section 29(1);

Commonwealth Environment Act means the *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth);

condition includes a restriction or limitation;

contaminated has the same meaning as it has in the *Contaminated Sites Act 2003*;

contaminated sites auditor means a person accredited as a contaminated sites auditor under the *Contaminated Sites Act 2003*;

controlled work has the meaning given in section 52;

corporation has the meaning given in the *Corporations Act 2001* (Commonwealth) section 57A;

decision-making authority, in relation to a proposal, means a public authority empowered by or under —

- (a) a written law; or
- (b) any agreement —
 - (i) to which the State is a party; and
 - (ii) which is ratified or approved by an Act,

to make a **decision** in respect of ~~any~~ **the** proposal and, in Division 2 of Part IV, includes, in relation to a particular proposal, any Minister prescribed for the purposes of this definition as being the Minister responsible for that proposal;

(ii) Redraft s45 to clarify how the two tiers of DMAs (key and non-key) must function when deciding if a proposal may be implemented.

decision-making authority, in relation to a scheme, means a public authority empowered by or under —

(a) a written law; or

(b) any agreement —

(i) to which the State is a party; and

(ii) which is ratified or approved by an Act,

to make a decision in respect of the scheme;

Department means the department of the Public Service of the State through which this Act is administered;

Deputy ¹**chairman** means the Authority member appointed to be Deputy ²**chairman** of the Authority under section 7(4a);

development approval means —

(a) a development approval under a scheme or a scheme Act; or

(b) a subdivision approval under the *Planning and Development Act 2005*;

³**discharge**, in relation to waste or other matter, includes deposit it or allow it to escape, or cause or permit it to be, or fail to prevent it from being, discharged, deposited or allowed to escape;

draft policy means a draft of an environmental protection policy prepared under section 26;

driver, in relation to —

(a) a vehicle as defined in the *Road Traffic (Administration) Act 2008* section 4, has the meaning given by that section; or

(b) a vehicle other than a vehicle referred to in paragraph (a), means the pilot or other person steering or controlling the movements of that vehicle; or

(c) a vessel, means the master as defined by the *Western Australian Marine Act 1982*;

ecological community means a naturally occurring assemblage of organisms that occurs in a particular habitat;

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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020 10:39:39 AM

Change 'Chairman' to 'Chairperson' or 'Chair'

 Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020 10:40:48 AM

Change 'Chairman' to 'Chairperson' or 'Chair'

 Number: 3 Author: CME WA Subject: Highlight Date: 24/01/2020 3:37:55 PM

Recommend review of wording - doesn't read well / grammar. Keep intent of definition.

s. 3

ecosystem health condition means a condition of the ecosystem which is —

- (a) relevant to the maintenance of ecological structure, ecological function or ecological process and which requires protection from the effects of emissions or of activities referred to in paragraph (a) or (b) of the definition of ***environmental harm*** in section 3A(2); or
- (b) identified and declared under section 35(2) to be an ecosystem health condition to be protected under an approved policy;

emission means —

- (a) discharge of waste; or
- (b) emission of noise, odour or electromagnetic radiation; or
- (c) transmission of electromagnetic radiation;

environment, subject to subsection (2), means living things, their physical, biological and social surroundings, and interactions between all of these;

environmental harm has the meaning given by section 3A;

environmental monitoring programme has the meaning given by section 110K;

environmental protection covenant means an environmental protection covenant, as amended from time to time, entered into under Part VB;

environmental protection notice has the meaning given by section 65;

environmental undertaking means —

- (a) a biodiversity conservation agreement under the *Biodiversity Conservation Act 2016* section 114; or
- (b) a biodiversity conservation covenant under the *Biodiversity Conservation Act 2016* section 122; or
- (c) a conservation covenant or agreement to reserve under the *Soil and Land Conservation Act 1945* section 30B; or

(d) an environmental protection covenant; or

(e) some other form of binding undertaking to manage land for the protection of the environment;

environmental value means —

- (a) a beneficial use; or
- (b) an ecosystem health condition;

equipment means any apparatus, appliance, boiler, chimney, crane, device, dredge, engine, facility, fireplace, furnace, generator, incinerator, instrument (including musical instrument), kiln, machine, mechanism, oven, plant, railway locomotive, retort, structure, tool, vehicle or vessel or any other equipment of any kind whatsoever;

final approval, in relation to a scheme which is —

[(a), (aa) *deleted*]

- (ab) prepared under the *Hope Valley-Wattleup Redevelopment Act 2000*, means an approval under section 15 of that Act, or under section 17 of that Act as read with that section; or

[(b) *deleted*]

- (c) a region planning scheme, or an amendment to a region planning scheme, means an approval under section 53 or 62, as the case requires, of the *Planning and Development Act 2005*; or

- (d) a local planning scheme, or an amendment to a local planning scheme, means an approval under section 87(2) of the *Planning and Development Act 2005*; or

- (e) a State planning policy to which section 32 of the *Planning and Development Act 2005* applies, or an amendment to such a policy, means an approval under section 87(2), as read with section 32, of that Act; or

- (f) an improvement scheme, or an amendment to an improvement scheme, means an approval under the *Planning and Development Act 2005* section 87(2), as read with section 122B(1) of that Act; or

s. 3

- (g) prepared under the *Metropolitan Redevelopment Authority Act 2011*, means an approval given under section 47 of that Act, or under section 49 of that Act as read with that section;

fuel burning equipment means equipment (other than a motor vehicle) or an open fire in the operation of which fuel or other combustible material is or is to be used or which is or is to be used in or in connection with the burning of fuel or other combustible material;

implementation agreement or decision means an agreement or decision under section 45 (or under section 45 as applied by section 46(8)) as to whether or not a proposal to which a report published under section 44(3) relates may be implemented and, if that proposal may be implemented, as to what conditions and procedures, if any, that implementation is subject;

implementation conditions means the conditions and procedures, if any, agreed or decided in relation to a proposal under section 45 (or under section 45 as applied by [section 46\(8\)\) and, if those conditions and procedures are changed under section 46C or on an appeal lodged under section 100\(3\), means those conditions and procedures as so changed; ~~section 46\(8\)\)~~;](#)

improvement scheme has the meaning given in the *Planning and Development Act 2005* section 4(1);

industrial plant means equipment —

- (a) which is used for the manufacturing, processing, handling, transport, storage or disposal of materials in or in connection with any trade, industry or process; or
- (b) which when operated is capable of an emission; or
- (c) which is of a prescribed class;

inspector means a person appointed to be an inspector under section 88, and includes the CEO;

licence means a licence granted and in force under Part V Division 3;

~~***licensee*** means the holder of a licensee;~~

local planning scheme has the meaning given to that term in the *Planning and Development Act 2005* section 4;

material environmental harm has the meaning given by section 3A;

materials includes raw materials, materials in the process of manufacture, manufactured materials, by-products and waste;

monitoring programme means all actions taken and equipment used for the purpose of detecting or measuring quantitatively or qualitatively the presence, amount or level of any substance, characteristic, noise, odour, electromagnetic radiation or effect;

motor vehicle has the meaning given by the *Road Traffic (Administration) Act 2008* section 4;

native vegetation means indigenous aquatic or terrestrial vegetation, and includes dead vegetation unless that dead vegetation is of a class declared by regulation to be excluded from this definition but does not include vegetation in a plantation;

NEPM means a national environment protection measure within the meaning of the *National Environment Protection Council (Western Australia) Act 1996*;

noise includes vibration of any frequency, whether transmitted through air or any other physical medium;

occupier, in relation to —

- (a) any premises, means a person who is in occupation or control of those premises, whether or not that person is the owner of those premises; or
- (b) premises different parts of which are occupied by different persons, means, in relation to any such part, a person who is in occupation or control of that part, whether or not that person is the owner of that part;

owner, in relation to —

- (a) a vehicle as defined in the *Road Traffic (Administration) Act 2008* section 4, has the meaning given by section 5 of that Act; or

s. 3

- (b) a vessel, has the meaning given by the *Western Australian Marine Act 1982*;

period of public review, in relation to a scheme which is —

[(a), (aa) *deleted*]

- (ab) prepared under the *Hope Valley-Wattleup Redevelopment Act 2000*, means the period referred to in section 14(1)(a) of that Act, or in section 17 of that Act as read with that section; or

[(b) *deleted*]

- (c) a region planning scheme, or an amendment to a region planning scheme, means the period referred to in section 44(1) or 58(1)(b), as the case requires, of the *Planning and Development Act 2005*; or

- (d) a local planning scheme, or an amendment to a local planning scheme, means the period of advertisement for public inspection prescribed for the purposes of section 84 of the *Planning and Development Act 2005*; or

- (e) a State planning policy to which section 32 of the *Planning and Development Act 2005* applies, or an amendment to such a policy, means the period of advertisement for public inspection prescribed for the purposes of section 84, as read with section 32, of that Act; or

- (f) an improvement scheme, or an amendment to an improvement scheme, means the period of advertisement for public inspection prescribed for the purposes of the *Planning and Development Act 2005* section 84, as read with section 122B(1) of that Act; or

- (g) prepared under the *Metropolitan Redevelopment Authority Act 2011*, means the period set and notified under section 43 of that Act, or under section 49 of that Act as read with that section;

person includes a public authority;

planning instrument means —

- (a) a scheme or a strategy, policy or plan made or adopted under a scheme; or
- (b) a State planning policy approved under the *Planning and Development Act 2005* section 29 and published in the *Gazette*; or
- (c) a local planning strategy made under the *Planning and Development Act 2005*;

plantation means one or more groups of trees, shrubs or plants intentionally sown, planted or propagated with a view to commercial exploitation;

pollution has the meaning given by section 3A;

practicable means reasonably practicable having regard to, among other things, local conditions and circumstances (including costs) and to the current state of technical knowledge;

practicable means includes provision and maintenance of equipment and proper use of equipment;

premises means residential, industrial or other premises of any kind whatsoever and includes land, water and equipment;

prescribed means prescribed by the regulations;

prescribed activity means an activity prescribed as a prescribed activity for the purposes of Part V;

~~**prescribed premises** means premises prescribed for the purposes of Part V;~~

prevention notice has the meaning given by section 73A(1);

proponent, in relation to a proposal, means the person who or which is responsible for the proposal, or the public authority on which the responsibility for the proposal is imposed under another written law;

proposal means —

- (a) a policy, plan or programme; or
- (b) a project, undertaking or development; or
- (c) a change in land use; or

s. 3

(d) an amendment of any proposal described in paragraph (a), (b) or (c).

but does not include a scheme;

~~**proposal** means a project, plan, programme, policy, operation, undertaking or development or change in land use, or amendment of any of the foregoing, but does not include scheme;~~

proposal under an assessed scheme means an application under the assessed scheme or an Act for the approval of any development or subdivision of any land within the area to which the assessed scheme applies;

protection, in relation to the environment, includes conservation, preservation, enhancement and management thereof;

public authority means a Minister of the Crown acting in² official capacity, department of the Government, State agency or instrumentality, local government or other person, whether corporate or not, who or which under the authority of a written law administers or carries on for the benefit of the State, or any district or other part thereof, a social service or public utility;

public place means a place that is open to the public or is used by the public, whether or not on payment of money or other consideration, whether or not that place is ordinarily so open or used and whether or not the public to whom that place is so open, or by whom that place is so used, consists only of a limited class of persons;


publication regulations means the regulations referred to in Schedule 2 Item 36B;

region planning scheme has the meaning given to that term in the *Planning and Development Act 2005* section 4;


Registrar of Deeds and Transfers has the meaning given in the *Registration of Deeds Act 1856* section 2;

Registrar of Titles means the person designated to be the Registrar of Titles under the *Transfer of Land Act 1893* section 7(1);

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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020
2:17:56 PM

Change 'his' to 'their' or 'his / her'

 Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020
10:51:53 AM

Change 'his' to 'their' or 'his / her'

regulations means the regulations under section 123(1);

relevant decision-making authority, in relation to a proposal, means a decision-making authority determined by the Authority to be a relevant decision-making authority in relation to that proposal;

repealed Act means the *Environmental Protection Act 1971*;

reserve means land or waters or both reserved by or under a written law for a public purpose;

responsible authority, in relation to —

(a) a scheme which is —

[(i), (ii) *deleted*]

(iii) prepared under the *Hope Valley-Wattleup Redevelopment Act 2000*, means the Western Australian Land Authority established by section 5(1) of the *Western Australian Land Authority Act 1992*; or

[(iv), (v) *deleted*]

(vi) a region planning scheme, or an amendment to a region planning scheme, means the Western Australian Planning Commission; or

(vii) a local planning scheme, or an amendment to a local planning scheme, means the local government which is responsible for the local planning scheme or amendment; or

(viii) a State planning policy to which section 32 of the *Planning and Development Act 2005* applies, or an amendment to such a policy, means the Western Australian Planning Commission; or

(ix) an improvement scheme, or an amendment to an improvement scheme, means the Western Australian Planning Commission; or

s. 3

- (x) prepared under the *Metropolitan Redevelopment Authority Act 2011*, means the Metropolitan Redevelopment Authority established by that Act;

or

- (b) a subdivision which is —
 - (i) an activity requiring approval under Part 10 Division 2 of the *Planning and Development Act 2005*, means the Western Australian Planning Commission; or
 - (ii) a strata plan, strata plan of subdivision or strata plan of consolidation required to be accompanied by a certificate issued under section 23² of the *Strata Titles Act 1985*, means the local government within the district of which the subdivision is proposed;

responsible Minister, in relation to a scheme, means the Minister to whom the administration of the relevant scheme Act is for the time being committed by the Governor;

road has the meaning given by the *Road Traffic (Administration) Act 2008* section 4;

scheme means —

~~[(a), (b) deleted]~~

- (c) a master plan within the meaning of the *Hope Valley-Wattleup Redevelopment Act 2000*, or an amendment to such a master plan; or

~~[(d), (e) deleted]~~

- (f) a region planning scheme, or an amendment to a region planning scheme; or
- (g) a local planning scheme, or an amendment to a local planning scheme; or
- (h) a State planning policy to which section 32 of the *Planning and Development Act 2005* applies, or an amendment to such a policy; or

- (i) an improvement scheme or an amendment to an improvement scheme; or
- (j) a redevelopment scheme prepared under the *Metropolitan Redevelopment Authority Act 2011* or an amendment to such a scheme;

scheme Act means any of the following Acts —

- (a) the *Planning and Development Act 2005*;
- (b) the *Metropolitan Redevelopment Authority Act 2011*;
- (c) the *Hope Valley-Wattleup Redevelopment Act 2000*;

sell includes —

- (a) barter, offer or attempt to sell, receive for sale, have in possession for sale, expose for or on sale, send, forward or deliver for sale or cause or permit to be sold or offered for sale; and
- (b) sell for resale;

serious environmental harm has the meaning given by section 3A;

significant amendment of an approved proposal means a significant proposal, as defined in section 37B, that is or includes the amendment of an approved proposal;

subsidiary has the meaning given in the *Corporations Act 2001* (Commonwealth) section 9;

Tier 1 offence means —

- (a) an offence listed in Part 1 of Schedule 1; or
- (b) an offence declared to be a Tier 1 offence under an approved policy;

Tier 2 offence means —

- (a) an offence listed in Part 2 of Schedule 1; or
- (b) an offence declared to be a Tier 2 offence under an approved policy;

Tier 3 offence means —

- (a) an offence listed in Part 3 of Schedule 1; or

s. 3

- (b) an offence declared to be a Tier 3 offence under an approved policy;

trade means a trade, business or undertaking, whether ordinarily carried on at fixed premises or at different places, the carrying on of which results or may result in an emission, and includes an activity prescribed to be a trade, business or undertaking for the purposes of this Act;

unreasonable noise has the meaning given by subsection (3);

vegetation conservation notice means a vegetation conservation notice given under section 70;

vehicle includes a self-propelled vehicle, whether operated on a road or rails or otherwise, aircraft or air-cushion vehicle or rolling stock, trailer, semi-trailer or caravan when attached to such a self-propelled vehicle;

vessel has the meaning given by the *Western Australian Marine Act 1982*;

waste includes matter —

- (a) whether liquid, solid, gaseous or radioactive and whether ¹ **useful or useless**, which is discharged into the environment; or
- (b) prescribed to be waste;

waters means any waters whatsoever, whether in the sea or on or under the surface of the land;

Western Australian Planning Commission means the Western Australian Planning Commission established by the *Planning and Development Act 2005*; ~~*Act 2005*~~;

~~**works approval** means a works approval granted and in force under Part V Division 3.~~

- (2) In the case of humans, the reference to social surroundings in the definition of **environment** in subsection (1) is a reference to aesthetic, ² **cultural**, economic and other social surroundings to the extent to which they directly affect or are affected by physical or biological surroundings.

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Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020 10:55:47 AM

As previously raised with DWER, this definition of 'waste' is problematic.

Although a wholesale revision of the waste legislative regime is not appropriate at this time, minor improvements should be possible as part of this reform. For example, DWER has released guidance around 'what is waste' - the core aspects of this should be incorporated so as to give that guidance some standing (guidance currently can not overrule / out rank the definition here in the Act).

Number: 2 Author: CME WA Subject: Highlight Date: 25/01/2020 1:24:31 PM

Request explicitly removing heritage from definition of social surroundings as this should be covered by the *Aboriginal Heritage Act 1972* (AH Act) (or its subsequent replacement). All efforts should be made as part of EP Act (and other legislative reform) to remove duplicated assessments and approvals. Note: Other environmental-related aspects of culture may be appropriately considered by the EP Act however the AH Act (or its replacement) must be the legislative tool for heritage.

~~—(2) For the purposes of the definition of **environment** in subsection (1), the social surroundings of man are his aesthetic, cultural, economic and social surroundings to the extent that those surroundings directly affect or are affected by his physical or biological surroundings.~~

- (2aa) A reference in this Act to the discharge, emission or transmission of anything (whether accompanied by the expression “into the environment” or not) —
- (a) is a reference to discharge, emission or transmission onto or into land, water, the atmosphere or living things; and
 - (b) in relation to discharge, emission or transmission from premises, includes a reference to discharge, emission or transmission onto or into land, water, the atmosphere or living things on, in, under, above or part of the premises.
- (2a) For the purposes of the definition of **proposal under an assessed scheme** in subsection (1), **subdivision** means —
- (a) an activity requiring the approval of the Western Australian Planning Commission under Part 10 Division 2 of the *Planning and Development Act 2005*; or
 - (b) a strata plan, strata plan of subdivision or strata plan of consolidation required to be accompanied by a certificate issued under section 23² of the *Strata Titles Act 1985*.
- (2b) If a person is for the time being nominated under section ~~38(6)~~ [39AA\(2\)](#) as being responsible for a proposal that person is to be regarded, for the purposes of the definition of **proponent** in subsection (1), as the person responsible for the proposal.
- (3) For the purposes of this Act, noise is to be taken to be unreasonable if —
- (a) it is emitted, or the equipment emitting it is used, in contravention of —

s. 3

- (i) this Act; or
 - (ii) any subsidiary legislation made under this Act; or
 - (iii) any requirement or permission (by whatever name called) made or given by or under this Act;
 - or
 - (b) having regard to the nature and duration of the noise emissions, the frequency of similar noise emissions from the same source (or a source under the control of the same person or persons) and the time of day at which the noise is emitted, the noise unreasonably interferes with the health, welfare, convenience, comfort or amenity of any person; or
 - (c) it is prescribed to be unreasonable for the purposes of this Act.
- (3a) A reference in this Act to the changing of implementation conditions is a reference to —
- (a) varying, removing or adding implementation conditions; or
 - (b) inserting implementation conditions where none existed.
- (4) A reference in this Act to amending a clearing permit ~~clearing permit, works approval~~ or licence includes a reference to revoking or amending any condition to which the clearing permit ~~clearing permit, works approval~~ or licence is subject and to making the clearing permit ~~clearing permit, works approval~~ or licence subject to a new condition.

[Section 3 amended: No. 113 of 1987 s. 32; No. 34 of 1993 s. 4; No. 84 of 1994 s. 46; No. 14 of 1996 s. 4; No. 23 of 1996 s. 12; No. 50 of 1996 s. 8; No. 14 of 1998 s. 4, 23 and 28; No. 38 of 1999 s. 71(2); No. 77 of 2000 s. 37(2); No. 25 of 2001 s. 69; No. 54 of 2003 s. 4, 28, 69, 98, 105, 109, 121 and 140(1); No. 60 of 2003 s. 100; No. 38 of 2005 s. 15; No. 36 of 2007 s. 100; No. 8 of 2009 s. 53; No. 28 of 2010 s. 25; No. 45 of 2011 s. 137(2)-(6); No. 8 of 2012 s. 100.]

3A. Terms used

(1) In this Act —

pollution means direct or indirect alteration of the environment —

- (a) to its detriment or degradation; or
- (b) to the detriment of an environmental value; or
- (c) of a prescribed kind,

that involves an emission.

(2) In this Act —

environmental harm means direct or indirect —

- (a) harm to the environment involving removal or destruction of, or damage to —
 - (i) native vegetation; or
 - (ii) the habitat of native vegetation or indigenous aquatic or terrestrial animals;

or

- (b) alteration of the environment to its detriment or degradation or potential detriment or degradation; or
- (c) alteration of the environment to the detriment or potential detriment of an environmental value; or
- (d) alteration of the environment of a prescribed kind;

material environmental harm means environmental harm that —

- (a) is neither trivial nor negligible; or
- (b) results in actual or potential loss, property damage or damage costs of an amount, or amounts in aggregate, exceeding the threshold amount;

serious environmental harm means environmental harm that —

- (a) is irreversible, of a high impact or on a wide scale; or
- (b) is significant or in an area of high conservation value or special significance; or

s. 4

- (c) results in actual or potential loss, property damage or damage costs of an amount, or amounts in aggregate, exceeding 5 times the threshold amount.

- (3) For the purposes of subsection (2) —

damage costs means the reasonable costs and expenses that are or would be incurred in taking all reasonable and practicable measures to prevent, control or abate the environmental harm and to make good resulting environmental damage;

threshold amount means \$20 000, or if a greater amount is prescribed ~~by regulation~~, that amount.

[Section 3A inserted: No. 54 of 2003 s. 29.]

4. Crown bound

This Act binds the Crown.

4A. Object and principles of Act

The object of this Act is to protect the environment of the State, having regard to the following principles —

Table

1. *The precautionary principle*

Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, decisions should be guided by —

- (a) careful evaluation to avoid, where practicable, serious or irreversible damage to the environment; and
- (b) an assessment of the risk-weighted consequences of various options.

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Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020
1:28:34 PM

CME notes that combined with the definition of "material environmental harm" and "serious environmental harm" this is a very low threshold for material or serious harm. This has implications in subsequent sections.

This definition uses the monetary amount to indicate the environmental outcome. This is inappropriate and will rarely be a strong correlation particularly once remote locations and logistical costs are considered. For example, a minor hydrocarbon spill (e.g. less than 20L) in to a leach drain that runs below the surface of slab would technically require excavation and removal of a slab (costing well more than \$20,000) if natural attenuation were not permitted. Similarly, a minor effluent spill in to an earthen sump in a remote mine site (e.g. less than 100L) may require mobilisation of a sucker truck from the nearest town which may be several hundred kilometres away also costing well more than \$20,000. Price does not equal environmental outcome and therefore in remote locations, this is an incredibly low threshold.

2. *The principle of intergenerational equity*

The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

3. *The principle of the conservation of biological diversity and ecological integrity*

Conservation of biological diversity and ecological integrity should be a fundamental consideration.

4. *Principles relating to improved valuation, pricing and incentive mechanisms*

- (1) Environmental factors should be included in the valuation of assets and services.
- (2) The polluter pays principle — those who generate pollution and waste should bear the cost of containment, avoidance or abatement.
- (3) The users of goods and services should pay prices based on the full life cycle costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any wastes.
- (4) Environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, which enable those best placed to maximise benefits and/or minimise costs to develop their own solutions and responses to environmental problems.

5. *The principle of waste minimisation*

All reasonable and practicable measures should be taken to minimise the generation of waste and its discharge into the environment.

[Section 4A inserted: No. 54 of 2003 s. 122.]

s. 5

5. Inconsistent laws

Whenever a provision of this Act or of an approved policy is inconsistent with a provision contained in, or ratified or approved by, any other written law, the provision of this Act or the approved policy, as the case requires, prevails.

[Section 5 amended: No. 54 of 2003 s. 90 and 123.]

6. Power of Minister or Authority to exempt

- (1) The Minister or the Authority may with the approval of the Governor declare by order that all or any of the provisions of this Act or of an approved policy do not apply according to that order in respect of —
 - (a) any specified area of the State; or
 - (b) any specified premises, act or thing; or
 - (c) all premises, acts or things comprised in a specified class thereof or situated in a specified area of the State.
- (2) The Minister or the Authority, as the case requires, may —
 - (a) subject a declaration made under this section to such circumstances or conditions or both as are specified; and
 - (b) require specified persons or members of specified classes of persons to comply with any conditions to which the declaration referred to in paragraph (a) is subjected,and, notwithstanding anything contained in this Act but subject to this section, a declaration so made has effect according to its tenor.
- (3) If the circumstances or conditions subject to which a declaration is made under this section cease to exist or are breached, or a declaration is revoked under subsection (4), the declaration ceases to have effect.
- (4) Subject to subsections (5) and (6), the Minister or the Authority, as the case requires, may with the approval of the Governor by order revoke a declaration made under this section.

- (5) The Minister or Authority shall, before exercising the power of revocation conferred on **1m** or it by subsection (4), publish in the *Gazette* reasonable notice of **3s** or its intention to exercise that power so as to enable persons likely to be aggrieved by the revocation of the declaration concerned to make representations in writing to the Minister or the Authority.
- (6) Notice is not reasonable notice within the meaning of subsection (5) unless the relevant notice is published in the *Gazette* not less than 14 days before the day on which the Minister or the Authority exercises the power of revocation concerned.
- (7) A person who breaches a condition with which **4** is required under subsection (2) to comply commits an offence.
- (8) Section 42 of the *Interpretation Act 1984* applies to an order made under this section as if that order were regulations within the meaning of that section of that Act, except that the reference in section 42(1) of that Act to 6 sitting days shall for the purposes of this section be construed as a reference to 9 sitting days.
- (9) Nothing in this section affects or prevents the application to the regulations of section 43(8)(d) of the *Interpretation Act 1984*.
- (10) In subsections (1) and (2) —
specified means specified in the relevant order made under this section.

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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020
11:11:25 AM

Change 'his' to 'their' or 'his / her'

 Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020
2:17:44 PM

Change to 'their' or 'his / her'

 Number: 3 Author: CME WA Subject: Highlight Date: 13/01/2020
11:10:29 AM

Change 'his' to 'their' or 'his / her'

 Number: 4 Author: CME WA Subject: Highlight Date: 17/01/2020
9:38:28 AM

Change 'he' to 'he / she' or 'they'

Environmental Protection Amendment Bill 2019

Part II Environmental Protection Authority

Division 1 Composition, procedure, etc. of Environmental Protection Authority

s. 7

Part II — Environmental Protection Authority

Division 1 — Composition, procedure, etc. of Environmental Protection Authority

7. Continuation and composition of Environmental Protection Authority

- (1) The body known as the Environmental Protection Authority and established under the repealed Act is under that name hereby continued in existence subject to this Act.
- (2) The Authority 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.
- (3) Before making a recommendation under subsection (2) the Minister shall publish in a ¹ily newspaper circulating throughout the State a notice calling for expressions of interest in appointment to the office of Authority member.
- (4) The Minister shall consider expressions of interest lodged in accordance with the notice but may make a recommendation under subsection (2) whether or not the person recommended has lodged an expression of interest.
- (4a) One of the Authority members shall be appointed by the Governor on the recommendation of the Minister to be the ²hairman of the Authority and another to be the Deputy ³hairman of the Authority.
- ~~(4b) ⁴he duties of the Chairman are to be performed on a full-time basis.~~
- (4c) The duties of an Authority member ~~other than the Chairman~~ are to be performed on a full-time or part-time basis as determined by the Governor on the recommendation of the Minister in the case of that member.

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Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020
11:12:52 AM

Suggest opportunity to contemporise the publication and notification aspects of the Act.

Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020
11:13:12 AM

Change 'Chairman' to 'Chairperson' or 'Chair'

Number: 3 Author: CME WA Subject: Highlight Date: 13/01/2020
11:13:30 AM

Change 'Chairman' to 'Chairperson' or 'Chair'


Number: 4 Author: CME WA Subject: Highlight Date: 13/01/2020
11:16:13 AM

CME members have noted the availability of the Deputy Chair (as either Acting Chair or as nominated delegate due to a conflict of interest) has been restricted / problematic due to the part-time availability of the Deputy Chair. If Chair role is to be on a part-time basis, it will be necessary to ensure that the function can still be delivered appropriately and will likely need to be monitored.


- (5) An Authority member shall not be a person who is employed under and subject to Part 3 of the *Public Sector Management Act 1994*.
- (6) Subject to this Act, an Authority member shall hold office for such period not exceeding 5 years as is specified in ² instrument of appointment, but may from time to time be reappointed.
- (7) The office of an Authority member becomes vacant if he —
- (a) becomes an insolvent under administration within the meaning of the *Corporations Act 2001* of the Commonwealth; or
 - (b) after ³ appointment as an Authority member, becomes a person employed under and subject to Part 3 of the *Public Sector Management Act 1994*; or
 - (c) is removed from office by the Governor —
 - (i) on the grounds of misbehaviour, incompetence, or mental or physical incapacity, impairing the performance of ⁴ functions and proved to the satisfaction of the Governor; or
 - (ii) it having been proved to the satisfaction of the Governor that the Authority member has absented ⁵ himself, except on leave granted by the Minister, from 3 consecutive meetings of the Authority of which ⁶ has had reasonable notice, on the grounds of ⁷ having so absented himself;
- or
- (d) resigns ⁸ his office by notice in writing delivered to the Minister.
- (8) The ⁹ Chairman or the Deputy ¹⁰ Chairman ceases to hold office as such if ¹¹ his office as an Authority member becomes vacant.

[Section 7 amended: No. 113 of 1987 s. 32; No. 34 of 1993 s. 5; No. 32 of 1994 s. 19; No. 10 of 2001 s. 70.]


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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020 2:17:28 PM


Change 'his' to 'their' or 'his / her'

 Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020 11:16:57 AM


Change 'his' to 'their' or 'his / her'

 Number: 3 Author: CME WA Subject: Highlight Date: 13/01/2020 11:17:32 AM


Change 'his' to 'their' or 'his / her'

 Number: 4 Author: CME WA Subject: Highlight Date: 13/01/2020 11:17:42 AM


Change 'his' to 'their' or 'his / her'

 Number: 5 Author: CME WA Subject: Highlight Date: 13/01/2020 11:17:50 AM

Change 'himself' to 'themselves' or 'himself / herself'

 Number: 6 Author: CME WA Subject: Highlight Date: 13/01/2020 11:19:36 AM

Change 'he' to 'they' or 'he / her'

 Number: 7 Author: CME WA Subject: Highlight Date: 13/01/2020 11:17:57 AM

Change 'his' to 'their' or 'his / her'



Comments from page 43 continued
on next page

- (5) An Authority member shall not be a person who is employed under and subject to Part 3 of the *Public Sector Management Act 1994*.
- (6) Subject to this Act, an Authority member shall hold office for such period not exceeding 5 years as is specified in his instrument of appointment, but may from time to time be reappointed.
- (7) The office of an Authority member becomes vacant if he —
- (a) becomes an insolvent under administration within the meaning of the *Corporations Act 2001* of the Commonwealth; or
 - (b) after his appointment as an Authority member, becomes a person employed under and subject to Part 3 of the *Public Sector Management Act 1994*; or
 - (c) is removed from office by the Governor —
 - (i) on the grounds of misbehaviour, incompetence, or mental or physical incapacity, impairing the performance of his functions and proved to the satisfaction of the Governor; or
 - (ii) it having been proved to the satisfaction of the Governor that the Authority member has absented himself, except on leave granted by the Minister, from 3 consecutive meetings of the Authority of which he has had reasonable notice, on the grounds of his having so absented himself;
- or
- (d) resigns his office by notice in writing delivered to the Minister.
- (8) The Chairman or the Deputy Chairman ceases to hold office as such in his office as an Authority member becomes vacant.

[Section 7 amended: No. 113 of 1987 s. 32; No. 34 of 1993 s. 5; No. 32 of 1994 s. 19; No. 10 of 2001 s. 70.]

Number: 8 Author: CME WA Subject: Highlight Date: 13/01/2020
11:18:05 AM

Change 'himself' to 'themselves' or 'himself / herself'

 Number: 9 Author: CME WA Subject: Highlight Date: 13/01/2020
11:19:59 AM

Change 'his' to 'their' or 'his / her'

 Number: 10 Author: CME WA Subject: Highlight Date: 13/01/2020
11:20:07 AM

Change 'Chairman' to 'Chairperson'

 Number: 11 Author: CME WA Subject: Highlight Date: 13/01/2020
11:20:15 AM

Change 'Chairman' to 'Chairperson'

 Number: 12 Author: CME WA Subject: Highlight Date: 13/01/2020
11:20:23 AM

Change 'his' to 'their' or 'his / her'

Environmental Protection Amendment Bill 2019

Part II Environmental Protection Authority

Division 1 Composition, procedure, etc. of Environmental Protection Authority

s. 8

8. Independence of Authority and ¹chairman

Subject to this Act, neither —

- (a) the Authority; nor
- (b) the ²chairman,

shall be subject to the direction of the Minister.

[Section 8 amended: No. 34 of 1993 s. 6.]

9. Remuneration and allowances of Authority members

Subject to section 7 the remuneration, travelling and other allowances and other terms and conditions of appointment of an Authority member shall be those that the Minister from time to time on the recommendation of the Public Sector Commissioner determines in ³s case.

[Section 9 amended: No. 34 of 1993 s. 7; No. 14 of 1998 s. 37; No. 39 of 2010 s. 89.]

10. Business of Authority

Subject to this Act, the business of the Authority shall be conducted in such manner as the Authority determines.

11. Meetings of Authority


- (1) The Authority shall hold meetings at such times and places as it determines, but —


- (a) the ⁴chairman may at any time; or
- (b) the Minister may when ⁵ wishes the Authority to discuss a matter on which ⁶ has requested its advice, convene a meeting of the Authority.


- (2) At a meeting of the Authority —


- (a) the ⁷chairman or, ~~in his absence if the Chairman is not present,~~ the Deputy Chairman shall preside, but, if both the Chairman and the Deputy Chairman are ~~absent from such a meeting~~ not present, the Authority members


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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020 11:20:38 AM
Change 'Chairman' to 'Chairperson'


 Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020 11:20:44 AM
Change 'Chairman' to 'Chairperson'

 Number: 3 Author: CME WA Subject: Highlight Date: 13/01/2020 11:22:26 AM
Change 'his' to 'their' or 'his / her'

 Number: 4 Author: CME WA Subject: Highlight Date: 13/01/2020 11:24:43 AM
Change 'Chairman' to 'Chairperson' or 'Chair'

 Number: 5 Author: CME WA Subject: Highlight Date: 13/01/2020 11:21:26 AM
Change 'he' to 'they' or 'he / her'

 Number: 6 Author: CME WA Subject: Highlight Date: 13/01/2020 11:22:00 AM
Change 'he' to 'they' or 'he / her'

 Number: 7 Author: CME WA Subject: Highlight Date: 13/01/2020 11:24:51 AM
Change 'Chairman' to 'Chairperson' or 'Chair'



Comments from page 44 continued
on next page

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Part II Environmental Protection Authority

Division 1 Composition, procedure, etc. of Environmental Protection Authority

s. 8

8. Independence of Authority and Chairman

Subject to this Act, neither —

- (a) the Authority; nor
- (b) the Chairman,

shall be subject to the direction of the Minister.

[Section 8 amended: No. 34 of 1993 s. 6.]

9. Remuneration and allowances of Authority members

Subject to section 7 the remuneration, travelling and other allowances and other terms and conditions of appointment of an Authority member shall be those that the Minister from time to time on the recommendation of the Public Sector Commissioner determines in his case.

[Section 9 amended: No. 34 of 1993 s. 7; No. 14 of 1998 s. 37; No. 39 of 2010 s. 89.]

10. Business of Authority

Subject to this Act, the business of the Authority shall be conducted in such manner as the Authority determines.

11. Meetings of Authority

- (1) The Authority shall hold meetings at such times and places as it determines, but —

- (a) the Chairman may at any time; or
- (b) the Minister may when he wishes the Authority to discuss a matter on which he has requested its advice, convene a meeting of the Authority.

- (2) At a meeting of the Authority —

- (a) the Chairman or, ~~in his absence if the~~ ⁸Chairman is not present, the Deputy ⁹Chairman shall preside, but, if both the ¹⁰Chairman and the Deputy ¹¹Chairman are ~~absent from such a meeting~~ ¹²present, the Authority members

Number: 8 Author: CME WA Subject: Highlight Date: 13/01/2020
11:22:56 AM

Change 'Chairman' to 'Chairperson'

 Number: 9 Author: CME WA Subject: Highlight Date: 13/01/2020
11:24:59 AM

Change 'Chairman' to 'Chairperson' or 'Chair'

 Number: 10 Author: CME WA Subject: Highlight Date: 13/01/2020
11:25:12 AM

Change 'Chairman' to 'Chairperson' or 'Chair'

 Number: 11 Author: CME WA Subject: Highlight Date: 13/01/2020
11:25:06 AM

Change 'Chairman' to 'Chairperson' or 'Chair'

 Number: 12 Author: CME WA Subject: Highlight Date: 25/01/2020
1:30:50 PM

Recommend confirm this definition will still hold if meetings are to be done virtually using e.g. teleconference, Skype etc.

present shall elect one of their number to preside at that meeting; and

- (b) 3 Authority members constitute a quorum; and
- (c) subject to section 12(25)(b) each Authority member present shall cast a deliberative vote on any question that is to be decided; and
- (d) any question shall be decided by a majority of the votes cast by the Authority members present, but if the voting on a question is equally divided, the person presiding at that meeting has a casting vote in addition to a deliberative vote; and
- (e) a question shall not be decided unless at least 3 Authority members vote thereon.

(2A) At a meeting of the Authority the presence of an Authority member need not be by attendance in person but may be by that Authority member and each other Authority member at the meeting being simultaneously in contact by telephone or other means of ¹stantaneous communication.

- (3) Notice of meetings of the Authority shall be given to the Department, and the CEO, or a representative of the CEO, is entitled to ~~attend~~ be present at any meeting and to take part in the consideration and discussion of any matter before a meeting, but shall not vote on any matter.

(4) At a meeting of the Authority the presence of a person under subsection (3) need not be by attendance in person but may be by that person ²d each Authority member at the meeting being simultaneously in contact by telephone or other means of ³stantaneous communication.

[Section 11 amended: No. 34 of 1993 s. 8; No. 54 of 2003 s. 140(2).]

12. Disclosure of interests by Authority members

- (1) An Authority member who has a direct or indirect pecuniary interest in a matter that is before a meeting of the Authority

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📄 Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020
1:31:50 PM

Recommend an alternative term be used instead of "instantaneous". Taking a strict compliance view following the Forrest & Forrest High Court Case, methods like teleconference, Skype, Webex, Teams (etc.) are not technically "instantaneous" and this may result in a legal challenge. CME support the intent of allowing increased flexibility about meeting and reducing travel time, but the definition must be robust and defensible against legal challenge.

📄 Number: 2 Author: CME WA Subject: Highlight Date: 25/01/2020
1:32:13 PM

Unclear why "Authority member" is included here when Authority member is covered by (2A), and (3) refers to persons other than the Authority members.
Please check drafting.

📄 Number: 3 Author: CME WA Subject: Highlight Date: 14/01/2020
8:33:18 AM

See comments above about 'instantaneous communication' and concerns regarding legal challenge given these are not 'instantaneous' under Forrest & Forrest strict compliance considerations.

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shall, as soon as possible after the relevant facts have come to ¹ knowledge, disclose the nature of ² interest to Authority members who are at that meeting, and that disclosure shall be recorded in the minutes of the proceedings of that meeting.

[(2) deleted]

- (3) If an Authority member has, in the opinion of the person presiding at a meeting of the Authority, a direct or indirect pecuniary interest in a matter before that meeting, the person so presiding may call on the Authority member to disclose the nature of that interest and, in default of any such disclosure, may determine that the Authority member has that interest.
- (4) A determination under subsection (3) that an Authority member is interested in a matter shall be recorded in the minutes of the proceedings of the meeting concerned.
- (5) If an Authority member discloses an interest in a matter under subsection (1) or is determined under subsection (3) to have an interest in a matter, the Authority member shall not —
 - (a) take part, as an Authority member, in the consideration or discussion of the matter; or
 - (b) vote on the matter.

[Section 12 amended: No. 54 of 2003 s. 124.]


13. Decisions of persons presiding at meetings of Authority

In any case of difficulty, dispute or doubt respecting or arising out of —


- (a) matters of order or procedure; or
- (b) the determination of an interest under section 12,

the decision of the person presiding at the relevant meeting of the Authority shall be final and conclusive.

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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020
2:17:05 PM

Change 'his' to 'their' or 'his / her'

 Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020
2:16:57 PM

Change 'his' to 'their' or 'his / her'

14. Minutes to be kept of meetings of Authority

- (1) Minutes of the proceedings of every meeting of the Authority shall —
- (a) be kept in a concise and accurate manner; and
 - (b) be approved by the person presiding at that meeting or at the next succeeding meeting of the Authority.

- (2) Subject to the publication regulations, the Authority shall cause the minutes kept under subsection (1) to be made available for public inspection under such conditions and at such places and times as are prescribed published in a prescribed manner.

[Section 14 amended: No. 34 of 1993 s. 9.]

14A. Decision without meeting

- (1) The purpose of this section is to enable the Authority to make a decision on a matter (the *matter*) without a meeting of the Authority being held.
- (2) A notice setting out a draft decision on the matter may be sent by the ¹chairman ²each other Authority member for consideration.
- (3) Subject to subsection (4), an Authority member may, by notice sent to each other Authority member, cast a vote on whether or not the decision should be made.
- (4) An Authority member who has a direct or indirect pecuniary interest in the matter cannot cast a vote under subsection (3).
- (5) If at least 3 Authority members cast a vote under subsection (3) and a majority of the votes are in favour of the decision being made, the decision is taken to have been made and is as effectual as if it had been made at a meeting of the Authority.
- (6) The Authority must cause a ³record to be kept of each decision under subsection (5).

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 Number: 1 Author: CME WA Subject: Highlight Date: 14/01/2020 8:40:48 AM

Change 'Chairman' to 'Chairperson' or 'Chair'

 Number: 2 Author: CME WA Subject: Highlight Date: 14/01/2020 8:42:36 AM

Should this also make reference to the Deputy Chair in those instances where the Chair is absent and hence the Deputy Chair is acting as the Chair?

 Number: 3 Author: CME WA Subject: Highlight Date: 14/01/2020 8:43:30 AM

This use of 'record' does not link back to the early clause about records. Not sure if such a link that is necessary / beneficial.

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15. Objectives of Authority

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

- (a) to protect the environment; and
- (b) to prevent, control and abate pollution and environmental harm.


[Section 15 amended: No. 54 of 2003 s. 30.]

16. Functions of Authority

The functions of the Authority are —

- (a) to conduct environmental impact assessments; and
- ~~(aa) to facilitate the implementation of bilateral agreements; and~~
- (b) to consider and initiate the means of protecting the environment and the means of preventing, controlling and abating pollution and environmental harm; and
- (c) to encourage and carry out studies, investigations and research into the problems of environmental protection and the prevention, control and abatement of pollution and environmental harm; and
- (d) to obtain the advice of persons having special knowledge, experience or responsibility in regard to environmental protection and the prevention, control and abatement of pollution and environmental harm; and
- (da) to advise the Minister on the making or amendment of regulations when requested by the Minister to do so or on its own initiative; and
- (e) to advise the Minister on environmental matters generally and on any matter which ¹ may refer to it for advice, including the environmental protection aspects of any proposal or scheme, and on the evaluation of information relating thereto; and
- (f) to prepare, and seek approval for, environmental protection policies; and

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 Number: 1 Author: CME WA Subject: Highlight Date: 17/01/2020
10:40:02 AM

Change 'he' to 'he / she' or 'they'

- (g) to promote environmental awareness within the community and to encourage understanding by the community of the environment; and
- (h) to receive representations on environmental matters from members of the public; and
- (i) to provide advice on environmental matters to members of the public; and
- (j) to publish reports on environmental matters generally; and
- (k) to publish for the benefit of planners, builders, engineers or other persons guidelines to assist them in undertaking their activities in such a manner as to minimise the effect on the environment of those activities or the results thereof; and
- (l) to keep under review the progress made in the attainment of the objects and purpose of this Act; and
- (m) to coordinate all such activities, whether governmental or otherwise, as are necessary to protect, restore or improve the environment in the State; and
- (n) to establish and develop criteria for the assessment of the extent of environmental change, pollution and environmental harm; and
- (o) to specify standards and criteria, and the methods of sampling and testing to be used for any purpose; and
- (p) to promote, encourage, coordinate or carry out planning and projects in environmental management; and
- (q) generally, to perform such other functions as are prescribed.

[Section 16 amended: No. 23 of 1996 s. 13; No. 54 of 2003 s. 31, 106 and 125.]

17. Powers of Authority

- (1) The Authority has all such powers as are reasonably necessary to enable it to perform its functions.

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- (2) The Authority may, on matters relevant to the purposes of this Act, confer and collaborate with Departments of the Commonwealth or of Territories or, other States, or other agencies, bodies or instrumentalities of the Commonwealth or of Territories or other States having to do with environmental protection.
- (3) Without limiting the generality of this section, the Authority, if it considers it appropriate or is requested to do so by the Minister, may —
 - (a) invite any person to act in an advisory capacity to the Authority in relation to all or any aspects of its functions; and
 - (b) advise the Minister on any matter relating to this Act or on any proposals, schemes or questions that may be referred to it with regard to environmental matters; and
 - (c) request the Minister to seek information on environmental management from any other Minister and, on receipt of that information, to give it to the Authority; and
 - (d) consider and make proposals as to the policy to be followed in the State with regard to environmental matters; and
 - (e) conduct and promote relevant research; and
 - (f) undertake investigations and inspections; and
 - (g) publish reports and provide information and advice on the environment to the community at large for the purpose of increasing public awareness of the environment; and
 - (h) exercise such powers, additional to those referred to in paragraphs (a) to (g), as are conferred on the Authority by this Act or as are necessary or convenient for the performance of the functions imposed on the Authority by this Act.

- ~~(4) Without limiting the generality of this section, for the purposes of its function under section 16(aa) the Authority may, in relation to the assessment of a proposal to which a bilateral agreement applies —~~
- ~~(a) have regard to requirements made by the bilateral agreement when deciding the level of assessment to be used; and~~
- ~~(b) prepare guidelines and publish material as required under the bilateral agreement; and~~
- ~~(c) require the proponent to do anything necessary to give effect to the bilateral agreement; and~~
- ~~(d) make its report in a manner that satisfies the requirements of the bilateral agreement.~~

[Section 17 amended: No. 23 of 1996 s. 14; No. 54 of 2003 s. 107.]

17A. Provision of services, information etc. to Authority

- (1) The Minister shall ensure that the Authority is provided with such services and facilities as are reasonably necessary to enable it to perform its functions.
- (2) Without limiting subsection (1), the Minister may, by arrangement with the Authority, and on such terms and conditions as may be mutually arranged with the Authority, allow the Authority to make use, either full-time or part-time, of —
- (a) the services of any officer or employee employed in the Department; or
- (b) any services or facilities of the Department.
- (3) This section does not limit the operation of section 24.

[Section 17A inserted: No. 34 of 1993 s. 10.]

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Division 1 Composition, procedure, etc. of Environmental Protection Authority

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18. Delegation by Minister

- (1) The Minister may delegate, either generally or as otherwise provided by the instrument of delegation, to —
 - (a) any officer or other person referred to in section 22; or
 - (b) a public authority or officer or employee thereof; or
 - (c) any other person,specified in the instrument of delegation (in this section called the *delegate*) all or any of ¹ its powers and duties under this Act, other than this power of delegation.
- (2) The Minister shall cause the name or title of the delegate to be published in the *Gazette* as soon as is practicable after the making of the delegation concerned.
- (3) A power or duty delegated by the Minister under this section shall, if exercised or performed by the delegate, be exercised or performed in accordance with the instrument of delegation.

19. Delegation by Authority

- (1) The Authority may, with the approval of the Minister, delegate, either generally or as otherwise provided by the instrument of delegation, to —
 - (a) any officer or other person referred to in section 22; or
 - (b) a public authority or officer or employee thereof; or
 - (c) any other person,specified in the instrument of delegation (in this section called the *delegate*) all or any of its powers and duties under this Act, other than this power of delegation.
- (2) The Authority shall cause the name or title of the delegate to be published in the *Gazette* as soon as is practicable after the making of the delegation concerned.
- (3) A power or duty delegated by the Authority under this section shall, if exercised or performed by the delegate, be exercised or performed in accordance with the instrument of delegation.

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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020
2:16:39 PM

Change 'his' to 'their' or 'his / her'

20. Delegation by CEO

- (1) The CEO may by notice published in the *Gazette*, with the approval of the Minister, delegate either generally or as otherwise provided in the notice, to —
- (a) an officer or other person referred to in section 22; or
 - (b) a public authority or officer or employee of a public authority; or
 - (c) any other person,

specified in the notice (in this section called the *delegate*) all or any of the powers and duties of the CEO under this Act, other than this power of delegation.

[(2) deleted]

- (3) The CEO shall cause the name or title of the delegate to be published in the *Gazette* as soon as is practicable after the making of the delegation concerned.
- (4) A power or duty delegated by the CEO under this section shall, if exercised or performed by the delegate, be exercised or performed in accordance with the instrument of delegation.

[Section 20 amended: No. 34 of 1993 s. 11; No. 14 of 1998 s. 29; No. 54 of 2003 s. 140(2).]

21. Authority to make annual report

The Authority shall as soon as practicable after the end of each financial year and in any event before the end of October next following that financial year make an annual report to the Minister on —

- (a) the activities of the Authority during that financial year; and
- (b) environmental matters generally,

and the Minister shall cause a copy of that report to be laid before each House of Parliament within 9 sitting days of that House after the receipt of that report by the Minister.

Division 2 — Staff of Department, etc.

22. Appointment and engagement of staff generally

- (1) There shall be appointed under and subject to Part 3 of the *Public Sector Management Act 1994* a chief executive officer and such other officers as are necessary to assist the Minister, the Authority and the CEO in the performance of their respective functions.
- (2) The CEO may engage persons as wages or field staff otherwise than under Part 3 of the *Public Sector Management Act 1994* and persons so engaged shall, subject to any relevant industrial award or agreement, be employed on such terms and conditions as the Minister determines on the recommendation of the Public Sector Commissioner.

[Section 22 amended: No. 34 of 1993 s. 12; No. 32 of 1994 s. 19; No. 14 of 1998 s. 37; No. 54 of 2003 s. 140(2); No. 39 of 2010 s. 89.]

[23. Deleted: No. 54 of 2003 s. 126.]


24. Use of staff and facilities of other departments etc.

The Minister or the Authority may, by arrangement made between ¹m or it and the Minister concerned, and on such terms and conditions as may be mutually arranged by ²m or it with that Minister and, if appropriate, with the relevant employing authority within the meaning of the *Public Sector Management Act 1994*, make use, either full-time or part-time, of —


- (a) the services of any officer or employee employed in the Public Service of the State or in a State agency or instrumentality or otherwise in the service of the Crown in right of the State; or
- (b) any facilities of a department of the Public Service of the State or of a State agency or instrumentality.

[Section 24 amended: No. 32 of 1994 s. 19.]

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 Number: 1 Author: CME WA Subject: Highlight Date: 17/01/2020 9:39:03 AM

Change 'him' to 'him / her' or 'them'

 Number: 2 Author: CME WA Subject: Highlight Date: 17/01/2020 9:39:12 AM


Change 'him' to 'him / her' or 'them'

25. Advisory groups, committees, councils and panels


- (1) The Minister or the Authority may establish such groups, committees, councils and panels —
 - (a) as he or it thinks are necessary for the purpose of advising **1**m or it on the administration of this Act; and
 - (b) with such terms of reference in each case as **2** or it thinks fit.
- (2) The Minister or the Authority may appoint such persons as **3** or it thinks fit to any group, committee, council or panel established by **4**m or it under subsection (1).
- (3) A member of a group, committee, council or panel appointed under subsection (2) is entitled to such remuneration and allowances as are on the recommendation of the Public Sector Commissioner determined by the Minister or the Authority, as the case requires, in **5**s case.
- (4) The terms and conditions, other than those referred to in subsection (3), applicable to or in relation to a person appointed under subsection (2) shall be as determined by the Minister or the Authority, as the case requires, from time to time either generally or with respect to a particular appointment.
- (5) A person appointed under subsection (2) is not by that reason alone an officer of the Public Service of the State.

[Section 25 amended: No. 14 of 1998 s. 37; No. 39 of 2010 s. 89.]


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 Number: 1 Author: CME WA Subject: Highlight Date: 17/01/2020
9:39:24 AM


Change 'him' to 'him / her' or 'them'

 Number: 2 Author: CME WA Subject: Highlight Date: 17/01/2020
9:39:51 AM


Change 'he' to 'he / she' or 'they'

 Number: 3 Author: CME WA Subject: Highlight Date: 17/01/2020
9:39:59 AM

Change 'he' to 'he / she' or 'they'

 Number: 4 Author: CME WA Subject: Highlight Date: 17/01/2020
9:39:34 AM

Change 'him' to 'him / her' or 'them'

 Number: 5 Author: CME WA Subject: Highlight Date: 13/01/2020
2:16:32 PM

Change 'his' to 'their' or 'his / her'

Part III — Environmental protection policies

26. Draft policy, preparation and publicising of

- (1) The Authority shall, if it considers it necessary or desirable for —

- (a) the protection of any portion of the environment; or
- (b) the prevention, control or abatement of pollution or environmental harm,

that an environmental protection policy be approved under section 31(d) —

- (c) prepare a draft of the environmental protection policy, having regard to the description of, and requirements in respect of, an approved policy set out in section 35; and
- (d) cause to be published once in the *Gazette*, and once during each week of a period of 3 consecutive weeks —

- (i) in a ¹ily newspaper circulating throughout the State; and
- (ii) in the case of a draft of an environmental protection policy concerned with the protection of a portion of the environment confined to, or with the prevention, control or abatement of pollution or environmental harm in, a particular local government district or districts, in a ²cal newspaper circulating within that district or those districts, as the case requires,

a notice containing such particulars of the draft referred to in paragraph (c), including the places at which, and the period during which, that draft will be available for public inspection, as are prescribed; and

- (e) make reasonable endeavours to consult in respect of the draft referred to in paragraph (c) such public authorities and persons as appear to the Authority to be likely to be affected by that draft; and

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Number: 1 Author: CME WA Subject: Highlight Date: 14/01/2020
8:47:15 AM

Suggest it is worth contemporising the publication requirements here. Opportunity to move to "prescribed manner" as has been proposed in other sections.

Number: 2 Author: CME WA Subject: Highlight Date: 14/01/2020
8:48:13 AM

See comment above - suggest contemporising.

- (f) in the case of a draft of an environmental protection policy of the kind referred to in paragraph (d)(ii), consult the Western Australian Planning Commission and the local government or local governments of the relevant district or districts in respect of that draft.
- (2) If the draft policy does not identify an area of the State to which it applies, consultation shall be carried out under subsection (1) as if the draft policy applied to the whole of the State.

[Section 26 amended: No. 14 of 1996 s. 4; No. 23 of 1996 s. 15; No. 54 of 2003 s. 32 and 91.]

27. Persons may make representations to Authority on draft policy

Any person may, in the manner and within the period specified in the relevant notice published under section 26(1)(d) or 32(1)(a), make representations to the Authority on the draft policy to which that notice relates.

28. Consideration, revision and submission to Minister of draft policy by Authority

- (1) After the expiry of the period specified in the relevant notice published under section 26(1)(d) or 32(1)(a), the Authority —
 - (a) shall consider any representations made to it under section 27 and any views expressed by the public authorities and persons consulted under section 26(1)(e) or 32(1)(a), and by any local government or local governments consulted under section 26(1)(f) or 32(1)(a), in respect of the draft policy to which that notice relates; and
 - (b) may revise the draft policy to which that notice relates; and
 - (c) shall, after revising the draft policy to which that notice relates to such extent, if any, as it considers necessary —
 - (i) cause to be published, in the same manner as a notice (in this subparagraph called a *first notice*)

s. 29

is published under section 26(1)(d), a notice in respect of that draft policy containing particulars of the same kind as those contained in a first notice; and

- (ii) submit a copy of that draft policy, together with a report thereon, to the Minister.

- (2) The Authority shall include reasons for any revision of the draft policy in the report referred to in subsection (1)(c)(ii).

[Section 28 amended: No. 14 of 1996 s. 4; No. 54 of 2003 s. 92.]

29. Public inquiry into draft policy

- (1) After receiving and considering a copy of a draft policy, together with a report thereon, submitted to **1**ⁿ under section 28 or 32(1)(b), the Minister —

- (a) shall, if **2** considers it expedient in the public interest to do so; or

- (b) may, if the Authority so requests,

by notice published in the *Gazette* appoint a committee of inquiry consisting of —

- (c) Authority members; or
 - (d) Authority members and persons other than Authority members; or
 - (e) persons other than Authority members,

to hold a public inquiry into and report to the Minister on the draft policy in accordance with terms of reference determined by **3**ⁿ.

- (2) A committee of inquiry shall hold a public inquiry into the draft policy in respect of which it is appointed and the *Royal Commissions Act 1968* applies to and in relation to that public inquiry as if references in that Act to —

- (a) a Commission were references to; and

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📄 Number: 1 Author: CME WA Subject: Highlight Date: 17/01/2020
9:40:16 AM

Change 'him' to 'him / her' or 'them'

📄 Number: 2 Author: CME WA Subject: Highlight Date: 17/01/2020
9:40:28 AM

Change 'he' to 'he / she' or 'they'

📄 Number: 3 Author: CME WA Subject: Highlight Date: 17/01/2020
9:40:51 AM

Change 'him' to 'him / her' or 'them'

- (b) the **1**airman were references to the **2**airman of; and
- (c) a Commissioner were references to a member of,
the committee of inquiry.
- (3) A committee of inquiry shall, after holding a public inquiry into the draft policy in respect of which it was appointed, report on that draft policy to the Minister.
- (4) The **3**airman and other members of a committee of inquiry shall each of them be paid such remuneration and travelling and other allowances as the Minister on the recommendation of the Public Sector Commissioner determines in **4**s case.

[Section 29 amended: No. 14 of 1998 s. 37; No. 39 of 2010 s. 89.]

30. Minister to consult on draft policy

- (1) Subject to subsection (3), after considering a copy of a draft policy, and the report on the draft policy, submitted to the Minister under section 28 or 32(1)(b), the Minister shall make reasonable endeavours to consult such public authorities and persons as appear to the Minister to be likely to be affected by the draft policy submitted.
- (2) Subsection (1) applies whether or not the Minister appoints a committee of inquiry under section 29 in respect of the draft policy submitted.
- (3) Subsection (1) applies unless the Minister is of the opinion that —
 - (a) the draft policy submitted is substantially the same as the draft policy in respect of which notice was published under section 26(1)(d); and
 - (b) the Authority has consulted such public authorities and persons as appear to the Minister to be likely to be affected by that draft policy.

[Section 30 inserted: No. 54 of 2003 s. 93.]

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 Number: 1 Author: CME WA Subject: Highlight Date: 14/01/2020 8:49:29 AM

Change 'Chairman' to 'Chairperson' or 'Chair'

 Number: 2 Author: CME WA Subject: Highlight Date: 14/01/2020 8:49:41 AM

Change 'chairman' to 'chairperson' or 'chair'

 Number: 3 Author: CME WA Subject: Highlight Date: 14/01/2020 8:49:51 AM

Change 'chairman' to 'chairperson' or 'chair'

 Number: 4 Author: CME WA Subject: Highlight Date: 13/01/2020 2:16:01 PM

Change 'his' to 'their' or 'his / her'

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31. Minister to remit draft policy, or approve it (with or without amendments) or refuse to approve it

After the Minister —

- (a) has received and considered —
 - (i) a copy of a draft policy (in this section called the *draft policy*), together with a report thereon, submitted to ¹m under section 28 or 32(1)(b); and
 - (ii) if a committee of inquiry is appointed under section 29 in respect of the draft policy, the report made by the committee of inquiry;

and

- (b) has consulted any public authority or person under section 30 in respect of the draft policy,

the Minister shall —


- (c) remit the draft policy to the Authority for reconsideration and shall, if he considers that the matter calling for remittal is of minor importance, give to the Authority a certificate to that effect briefly describing that matter and cause that certificate to be published in the *Gazette*; or
- (d) approve the draft policy, with or without such amendments as the Minister thinks fit to make to the draft policy, by order setting out the draft policy in amended or unamended form, as the case requires; or
- (e) refuse to approve the draft policy by order setting out ²s reasons for so refusing.

32. Reconsidering and resubmitting remitted draft policy


- (1) After receiving a draft policy remitted to it under section 31(c), the Authority shall —

- (a) if the Minister has not given a certificate under that section —
 - (i) cause to be published, in the same manner as a notice (in this subparagraph called a *first notice*)

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 Number: 1 Author: CME WA Subject: Highlight Date: 17/01/2020
9:40:58 AM

Change 'him' to 'him / her' or 'them'

 Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020
2:15:52 PM

Change 'his' to 'their' or 'his / her'

is published under section 26(1)(d), a notice in respect of that draft policy containing particulars of the same kind as those contained in a first notice; and

- (ii) make reasonable endeavours to consult in respect of that draft policy such public authorities and persons as appear to the Authority to be likely to be affected by that draft policy; and
 - (iii) in the case of a draft policy of the kind referred to in section 26(1)(d)(ii), consult the local government or local governments of the relevant district or districts in respect of that draft policy; and
 - (iv) reconsider that draft policy;
- or
- (b) if the Minister has given a certificate under that section —
 - (i) reconsider that draft policy; and
 - (ii) submit that draft policy, together with a report thereon, to the Minister.

(2) Sections 27, 28, 29, 30 and 31 apply to a draft policy reconsidered under subsection (1)(a).

(3) Sections 29, 30 and 31 apply to a draft policy reconsidered under subsection (1)(b).

[Section 32 amended: No. 14 of 1996 s. 4.]

33. Approved policies, status and revocation of

- (1) Subject to this section, a draft policy approved under section 31(d) has, until that approval is revoked under subsection (2) and subject to any specification under section 35(2)(b) and to section 42 of the *Interpretation Act 1984* the force of law, as though it had been enacted as part of this Act, on and from the day on which the relevant order is

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published in the *Gazette* under section 41 of the *Interpretation Act 1984* or such subsequent day as is specified in that order.

- (2) The Minister may, having obtained and considered the advice of the Authority in the matter, by order revoke an approval given under section 31(d).
- (3) An approval of a draft policy under section 31(d) and a revocation of an approved policy under subsection (2) may be contained in the same order.
- (4) To the extent that there is an inconsistency between an approved policy and a scheme which came into operation before the approved policy was approved under section 31(d), the approved policy prevails.
- (5) To the extent that there is an inconsistency between an approved policy and an assessed scheme which was assessed under Division 3 of Part IV after the approved policy was approved under section 31(d), that assessed scheme prevails.

[Section 33 amended: No. 23 of 1996 s. 16.]

34. Orders made under s. 31(d), Parliamentary oversight of

Section 42 of the *Interpretation Act 1984* applies to an order referred to in section 31(d) as if that order were regulations within the meaning of that section of that Act.

35. Content of approved policies

- (1) An approved policy —
 - (a) establishes the basis on which —
 - (i) the portion of the environment to which it relates is to be protected; or
 - (ii) pollution of, and environmental harm to, the portion of the environment to which it relates is to be prevented, controlled or abated,and may delineate programmes for that protection or that prevention, control or abatement, as the case requires;
and

- (b) may relate to any activity directed towards the protection, or the prevention, control or abatement, referred to in paragraph (a), whether in respect of any portion of the environment or an emission or otherwise.
- (1a) An approved policy may create offences and provide penalties for them as follows —
 - (a) for a Tier 1 offence —
 - (i) if the offender is an individual, a penalty not exceeding \$250 000 and, in the case of a continuing offence, a daily penalty not exceeding \$50 000; and
 - (ii) if the offender is a body corporate, a penalty not exceeding \$500 000 and, in the case of a continuing offence, a daily penalty not exceeding \$100 000;
 - and
 - (b) for a Tier 2 offence —
 - (i) if the offender is an individual, a penalty not exceeding \$62 500 and, in the case of a continuing offence, a daily penalty not exceeding \$12 500; and
 - (ii) if the offender is a body corporate, a penalty not exceeding \$125 000 and, in the case of a continuing offence, a daily penalty not exceeding \$25 000;
 - and
 - (c) for a Tier 3 offence, a penalty not exceeding \$5 000 and, in the case of a continuing offence, a daily penalty not exceeding \$1 000.
- (1b) For the purposes of subsection (1a), an offence is a Tier 1, Tier 2 or Tier 3 offence if the approved policy declares that such an offence is an offence of that category.

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- (2) An approved policy may, unless it is inappropriate in the circumstances to do so —
- (a) identify the portion of the environment, to which the approved policy applies; and
 - (b) specify —
 - (i) the period, if any, during each day, or any particular day, of 24 hours; and
 - (ii) subject to section 33(2) and section 42 of the *Interpretation Act 1984*, the total period, during which the approved policy has the force of law; and
 - (c) identify and declare the environmental values to be protected under the approved policy; and
 - (d) set out the indicators, parameters or criteria to be used in measuring environmental quality; and
 - (e) specify the environmental quality objectives to be achieved and maintained by means of the approved policy; and
 - (f) establish a programme by which the environmental quality objectives referred to in paragraph (e) are to be achieved and maintained, and may specify in that programme, among other things —
 - (i) the qualities and maximum quantities of any waste permitted to be discharged into the relevant portion of the environment; or
 - (ii) the maximum levels of noise, odour or electromagnetic radiation permitted to be emitted into the relevant portion of the environment; or
 - (iii) the minimum standards to be complied with in the installation and operation of works or equipment for the control of waste or noise, odour or electromagnetic radiation; or
 - (iv) measures designed to minimise the possibility of pollution or environmental harm; or

- (v) measures designed to protect the environment; or
 - (vi) measures designed to achieve the environmental values to be protected; or
 - (vii) procedures to evaluate the effectiveness of the programme,
- or any 2 or more of the matters referred to in subparagraphs (i), (ii), (iii), (iv), (v), (vi) and (vii).


- (3) An approved policy may provide that it applies to —
- (a) an area of the State identified in the policy; or
 - (b) an area of the State identified in the policy or by regulation; or
 - (c) the whole of the State; or
 - (d) the whole of the State other than an area identified in the policy; or
 - (e) the whole of the State other than an area identified by regulation; or
 - (f) the whole of the State other than an area identified in the policy or by regulation.

[Section 35 amended: No. 14 of 1998 s. 5; No. 54 of 2003 s. 33 and 94.]

36. Review of approved policies

- (1) The Authority shall review an approved policy —
- (a) if the Minister by notice published in the *Gazette* so directs, whether on the recommendation of the Authority, on ¹ his own initiative or otherwise, at the time or within the period and to the extent specified in that direction; and
 - (aa) if the approved policy is inconsistent with an assessed scheme which was assessed under Division 3 of Part IV after the approved policy was approved under section 31(d); and

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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020
2:15:44 PM

Change 'his' to 'their' or 'his / her'

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- (b) **1** less the Minister by notice published in the *Gazette* otherwise directs, within a period of 7 years from the date on which the approved policy was approved under section 31(d).

- (2) The review under subsection (1) of an approved policy shall be effected by means of a new draft policy prepared, dealt with and submitted to the Minister for approval under this Part.
- (3) The review of an approved policy does not change the force and effect of the approved policy.

[Section 36 amended: No. 23 of 1996 s. 17; No. 54 of 2003 s. 95.]

37. Minor changes to approved policies

- (1) The Minister may, if the Authority recommends, and the Minister agrees, that a minor change be made to an approved policy, give to the Authority a certificate stating that **2** so agrees and setting out the minor change so recommended and cause that certificate to be published in the *Gazette*.
- (2) After receiving a certificate given to it under subsection (1), the Authority shall amend the approved policy concerned by making the minor change to which that certificate relates and submit the approved policy as so amended, together with a report thereon, to the Minister.
- (3) After the Minister has received an approved policy submitted to **3** under subsection (2), together with a report thereon, he may —
- (a) confirm that approved policy by order setting out that approved policy as amended under that subsection; or
- (b) refuse to confirm that approved policy.
- (4) Subject to subsection (5), this Act applies to an approved policy confirmed under subsection (3) as if that approved policy had been approved under section 31(d) in its amended form on the date of that confirmation.

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Number: 1 Author: CME WA Subject: Highlight Date: 14/01/2020 8:54:29 AM

Although there are not many EPPs existing in WA, adherence to the 7 year review appears poor.

For example, "The *Environmental Protection (Kwinana) (Atmospheric Wastes) Policy 1999* is well beyond its 7-year review.

The Minister did a gazette notice to not review "at this time":

http://www.epa.wa.gov.au/sites/default/files/Policies_and_Guidance/Gazette%20Notice%20214%2016%20November%202010.pdf

The notice however states that "the minister **may** direct the EPA to undertake a review within a period of seven year from the date on which this notice is published". That 7 year period has now lapsed yet there is no further notice not to review nor indication of how a review is then to be initiated.

Subsequent reviews / reform of the EP Act should consider how EPPs are used and how they are maintained.

Number: 2 Author: CME WA Subject: Highlight Date: 14/01/2020 8:57:14 AM

Change 'he' to 'they' or 'he / she'

Number: 3 Author: CME WA Subject: Highlight Date: 17/01/2020 9:41:12 AM

Change 'him' to 'him / her' or 'them'

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- (5) Section 42 of the *Interpretation Act 1984* applies to an order referred to in subsection (3)(a) as if that order were regulations within the meaning of that section of that Act.

37A. NEPM may be declared to be approved policy

- (1) The Minister may, by notice published in the *Gazette*, declare that an NEPM specified in the declaration is, for the purposes specified in the declaration, to be taken to be an approved policy with the force of law, and the declaration has effect accordingly.
- (2) The Minister may by notice published in the *Gazette* revoke or amend a declaration made under subsection (1).

[Section 37A inserted: No. 14 of 1998 s. 30.]

1 **Part IV — Environmental impact assessment**

Division 1 — Referral and assessment of proposals

37B. Terms used

- (1) In this Division —

significant proposal means a proposal likely, if implemented, to have a significant effect on the environment;

strategic proposal has the meaning given by subsection (2).

- (2) A proposal is a *strategic proposal* if and to the extent to which it identifies —

- (a) a future proposal ~~that will be a significant proposal likely, if implemented, to have a significant effect on the environment~~; or
- (b) future proposals likely, if implemented in combination with each other, to have a significant effect on the environment.

[Section 37B inserted: No. 54 of 2003 s. 5.]

38. 2 Referral of proposals to Authority

- (1) Subject to subsections (2) and (5j), any person may refer a significant proposal to the Authority.
- (2) In the case of a proposal under an assessed scheme, only the proponent can refer the proposal to the Authority under subsection (1).
- (3) Subject to subsection (5j), the proponent of a strategic proposal may refer the proposal to the Authority.
- (4) If it appears to the Minister that there is public concern about the likely effect of a proposal, if implemented, on the environment, the Minister may refer the proposal to the Authority.

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Number: 1 Author: CME WA Subject: Highlight Date: 14/01/2020 9:08:25 AM

General comment on the drafting of Part IV:

Part IV has now been amended multiple times without a 'clean up' of the drafting. The current proposed amendments add to the complexity of the drafting and there are now numerous and frequent cross-references to different sections and poorly structured / grouped sections. Overall the drafting of Part IV appears to be unnecessarily complex and unwieldy making it difficult to understand.

We would suggest a more substantial re-write to clean up the Part (potentially a quasi-repeal and replace like what has occurred for Part V Division III).

The complicated drafting and cross-references also increase the likelihood of errors and omissions in drafting as well as the risk of legal challenge.

Number: 2 Author: CME WA Subject: Highlight Date: 14/01/2020 9:03:56 AM

It is recommended that a specific trigger be added for referral of an 'amendment' to Section 38 so that throughout the rest of Part IV, it can be clearly delineated in the drafting what specific clauses do and do not relate to the amendment. For example, the prohibition on other DMAs granting other approvals.

Number: 3 Author: CME WA Subject: Highlight Date: 25/01/2020

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Part IV — Environmental impact assessment

Division 1 — Referral and assessment of proposals

37B. Terms used

- (1) In this Division —

significant proposal means a proposal likely, if implemented, to have a significant effect on the environment;

strategic proposal has the meaning given by subsection (2).

- (2) A proposal is a *strategic proposal* if and to the extent to which it identifies —

- (a) a future proposal ~~that will be a significant proposal likely, if implemented, to have a significant effect on the environment~~; or
(b) future proposals likely, if implemented in combination with each other, to have a significant effect on the environment.

[Section 37B inserted: No. 54 of 2003 s. 5.]

38. Referral ³⁴ proposals to Authority

- (1) Subject to subsections (2) and (5j), any person may refer a significant proposal to the Authority.
- (2) In the case of a proposal under an assessed scheme, only the proponent can refer the proposal to the Authority under subsection (1).
- (3) Subject to subsection (5j), the proponent of a strategic proposal may refer the proposal to the Authority.
- (4) If it appears to the Minister that there is public concern about the likely effect of a proposal, if implemented, on the environment, the Minister may refer the proposal to the Authority.

1:33:52 PM

Recommend add a power / clause / decision point for the EPA to not accept a third party referral as valid. As discussed in later sections, it is possible to end up in an endless cycle of third-party referrals for a proposal which is unhelpful and inefficient. It may also help with third-party referrals where that proposal has appropriately been addressed through Part V (not significant) or pre-dates Part IV.

📄 Number: 4 Author: CME WA Subject: Highlight Date: 25/01/2020

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CME remains concerned there is a risk of third-party referrals for pre-existing proposals that pre-date Part IV. This should be addressed.

- (5) Subject to subsection (5j), as soon as a decision-making authority has notice of a proposal that appears to it to be —
- (a) a significant proposal; or
 - (b) a proposal of a prescribed class,
- the decision-making authority is to refer the proposal to the Authority.
- (5a) Subsection (5) does not apply if the proposal has been referred to the Authority under subsection (1) or (4).
- (5b) In the case of a proposal under an assessed scheme, the application of subsection (5)(a) is subject to section 48I.
- (5c) If the Authority considers that a proposal that is —
- (a) a significant proposal; or
 - (b) a proposal of a prescribed class,
- has not been referred to it under subsection (1), (4) or (5), the Authority is to require the proponent or a decision-making authority to refer the proposal to the Authority.
- (5d) A requirement under subsection (5c) is to be in writing and is to specify the period within which it has to be complied with.
- (5e) In the case of a proposal under an assessed scheme, the Authority can only require the referral of the proposal under subsection (5c) if it did not, when it assessed the assessed scheme under Division 3, have sufficient scientific or technical information to enable it to assess the environmental issues raised by the proposal.
- (5f) A requirement under subsection (5c) has effect despite section 48I(2).
- (5g) In subsections (5)(b) and (5c)(b), a reference to a proposal of a prescribed class includes a reference to a proposal of a prescribed class under an assessed scheme.
- (5h) A proponent or decision-making authority that has to refer a proposal to the Authority under a requirement under

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subsection (5c) is to do so within the period specified in the requirement.

(5i) A referral under this section is to be in writing.

(5j) Subject to sections 43A(3), 1C(3) and 46B(2), a proposal cannot be referred to the Authority under this section more than once unless —

(a) 2 der section 38AB, a referral of the proposal is 3 ken been withdrawn; or

(b) under section 38A(3), a referral of the proposal has been declared to have been withdrawn; or

(c) under section 40A, assessment of it the proposal has been terminated; or under section 40A.

(d) under section 47A, an implementation agreement or decision relating to the proposal has been revoked or is taken to have been revoked.

~~(6) 4 cept when the responsibility for a proposal is imposed on a public authority under another written law, the Minister shall, after consulting the Authority, nominate by notice in writing served on —~~

~~(a) the person concerned; and~~

~~(b) the Authority; and~~

~~(c) any relevant decision-making authority,~~

~~a person as being responsible for each proposal which is referred or required to be referred, or which ought to be referred, under this section and which the Authority considers should be assessed by it under this Part.~~

~~(6a) If the person nominated under subsection (6) ceases to have responsibility for a proposal, that person is to give the Authority written notice advising the name of the person to whom or which responsibility for the proposal will pass or has passed.~~

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Number: 1 Author: CME WA Subject: Highlight Date: 14/01/2020 9:18:30 AM

Does not exist.

Note: it is difficult to assess the potential effect of proposed drafting where sections are incorrectly cross-referenced and we can not deduce what section was intended to be referred to and hence what this clause was to be subjected to.

Number: 2 Author: CME WA Subject: Highlight Date: 25/01/2020 1:34:30 PM

Under 38AB, if a third party referred a proposal, and in the view of the proponent the proposal referred was inaccurate, incomplete, premature etc, the proponent may seek to have the specific proposal withdrawn so as to enable the proponent to refer the proposal once appropriately scoped etc. This may result in the proposal being referred prematurely / inaccurately multiple times by the third party frustrating the process and clogging up the EPA's resources. It is recommended the EPA be given an ability to decide a third party referral is invalid should this sort of circumstance arise.

Number: 3 Author: CME WA Subject: Highlight Date: 13/01/2020 2:15:28 PM

Change to '[...] taken to have been [...]'

Number: 4 Author: CME WA Subject: Highlight Date: 14/01/2020 9:25:45 AM

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subsection (5c) is to do so within the period specified in the requirement.

(5i) A referral under this section is to be in writing.

(5j) Subject to sections [43A\(3\)](#), [45C\(3\)](#) and [46B\(2\)](#), a proposal cannot be referred to the Authority under this section more than once unless —

[\(a\) under section 38AB, a referral of the proposal is taken been withdrawn; or](#)

[\(b\) under section 38A\(3\), a referral of the proposal has been declared to have been withdrawn; or](#)

[\(c\) under section 40A, assessment of ~~it~~ the proposal has been terminated; or ~~under section 40A.~~](#)

[\(d\) under section 47A, an implementation agreement or decision relating to the proposal has been revoked or is taken to have been revoked.](#)

~~(6) Except when the responsibility for a proposal is imposed on a public authority under another written law, the Minister shall, after consulting the Authority, nominate by notice in writing served on —~~

~~(a) the person concerned; and~~

~~(b) the Authority; and~~

~~(c) any relevant decision-making authority,~~

~~a person as being responsible for each proposal which is referred or required to be referred, or which ought to be referred, under this section and which the Authority considers should be assessed by it under this Part.~~

~~(6a) If the person nominated under subsection (6) ceases to have responsibility for a proposal, that person is to give the Authority written notice advising the name of the person to whom or which responsibility for the proposal will pass or has passed.~~

CME notes the intent of this clause has been largely retained but moved to 39AA. The role of the Minister in 39AA has been changed to the role of the Authority. CME supports this change in role as appropriate.

- ~~— (7) The Minister may, if he considers that a nomination made under subsection (6) should be revoked and after consulting the Authority, by notice in writing served on —~~
- ~~— (a) the person to whom or which that nomination relates; and~~
- ~~— (b) the Authority; and~~
- ~~— (c) any relevant decision-making authority,~~
- ~~— revoke that nomination and nominate another person under that subsection in respect of that proposal.~~
- ~~— (7a) Subsections (6a) and (7) apply even if a report on the proposal has been published under section 44(3) but do not apply if the assessment of the proposal has been terminated under section 40A.~~
- ~~— (8) For the purposes of subsections (6) and (7), a person who is an individual may be nominated as being responsible for a proposal by reference to his name or by reference to his being the person for the time being holding or acting in a particular office or position.~~
- ~~— (9) For the purposes of subsections (6a) and (7) and section 3(2b), a person that has been notified under section 39A(3)(a) that the Authority is going to assess a proposal is to be regarded as having been nominated under subsection (6) as being responsible for the proposal whether or not such a nomination has been made.~~

[Section 38 amended: No. 23 of 1996 s. 18; No. 57 of 1997 s. 54(1); No. 54 of 2003 s. 6.]

38AA. Proponent may amend a referred proposal

- (1) At any time before the Authority decides whether or not to assess a proposal that has been referred to it under section 38, the proponent may, by written notice, request the Authority to approve the proposal being amended in the manner set out in the request.

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(2) The Authority may, at its discretion, give or refuse to give approval under subsection (1).

(3) If approval is given by the Authority the proposal as so amended is taken to have been referred to the Authority under section 38.

38AB. Proponent may give notice that referred proposal will not proceed

(1) If at any time before the Authority has decided whether or not to assess a proposal referred to it under section 38 the Authority receives written notice from the proponent that the proponent does not wish to proceed with the proposal, the referral of the proposal is taken to have been withdrawn.

(2) This section applies whether or not the proposal was referred to the Authority by the proponent.

38A. Request for further information

- (1) If the Authority considers that it does not have enough information about a proposal referred to it under section 38 to enable it to decide —
- (a) whether or not to assess the proposal; or
 - (b) whether or not to agree to a request made under section 39B(1); or
 - (c) on the level of assessment if the proposal is going to be assessed,

it may, by written notice, request any person to provide it with additional information about the proposal. ¹thin a period specified in the notice.

- (2) The ²day period set by section 39A(3) is not to be regarded as having begun in relation to a proposal until each notice issued under subsection (1) in relation to the proposal has been complied with or, ~~in the case of a notice sent to a person other than the person who referred the proposal,~~ the period specified in the notice for complying with that notice has expired.

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Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020
1:35:53 PM

Recommend inclusion of a provision whereby referrals are not invalidated if the requested information is unable to be provided within the specified timeframe. In some instances, given the nature of the requested information, it is not possible or practicable for proponents to provide the information within the specified timeframe. This will particularly be the case if the referral was premature due it being a third-party referral. Also recommend adding "or as otherwise agreed in writing" or similar phrase to allow for circumstances where additional information may take longer to obtain.

As an example, it is not uncommon in northern WA to need to re-schedule planned field trips due to cyclonic or other weather events. It is unreasonable for a referred project to be automatically withdrawn or potentially invalidated following legal challenge due to a reasonable delay outside the proponent's control. Where this is the case, referrals should not be invalidated. The wording in s38A(3) is particularly forceful under such circumstances.

Recommend rewording or clarifying s38A(3) and well as modifying s38A(1).

Number: 2 Author: CME WA Subject: Highlight Date: 16/01/2020
10:44:19 AM

Non-compliance with the timeframe should not invalidate the referral or the subsequent assessment (where applicable). The request for information timeframe should be set up as a 'stop the

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(2) The Authority may, at its discretion, give or refuse to give approval under subsection (1).

(3) If approval is given by the Authority the proposal as so amended is taken to have been referred to the Authority under section 38.

38AB. Proponent may give notice that referred proposal will not proceed

(1) If at any time before the Authority has decided whether or not to assess a proposal referred to it under section 38 the Authority receives written notice from the proponent that the proponent does not wish to proceed with the proposal, the referral of the proposal is taken to have been withdrawn.

(2) This section applies whether or not the proposal was referred to the Authority by the proponent.

38A. Request for further information

- (1) If the Authority considers that it does not have enough information about a proposal referred to it under section 38 to enable it to decide —
- (a) whether or not to assess the proposal; or
 - (b) whether or not to agree to a request made under section 39B(1); or
 - (c) on the level of assessment if the proposal is going to be assessed,


it may, by written notice, request any person to provide it with additional information about the proposal within a period specified in the notice.

- (2) The 28 day period set by section ³A(3) is not to be regarded as having begun in relation to a proposal until each notice issued under subsection (1) in relation to the proposal has been complied with or, ~~in the case of a notice sent to a person other than the person who referred the proposal,~~ the period specified in the notice for complying with that notice has expired.

clock' mechanism for transparency of process. As currently written, none of the days of the 28 days prior to final receipt 'count'.

Consequently, the Authority may spend (eg) 27 days assessing the referral (which is substantial and largely complete) and then on day 28 request a minor additional piece of information thereby fully re-setting and entirely clear the preceding 27 days spent assessing the substance of the referral. This 'reset' approach is inconsistent with other assessment processes and use of 'stop the clock'.

Additionally, in CME's experience, the 28 days is rarely met and there are no consequences for failure to achieve this statutory timeframe.

 Number: 3 Author: CME WA Subject: Highlight Date: 14/01/2020
10:31:22 AM

Incorrect reference as section moved. Change to section 39A(1).

(3) If a notice in relation to a proposal is issued under subsection (1) to the person who referred the proposal and the period specified in the notice for complying with the notice expires without the notice having been complied with, the Authority may, by written notice to the person, declare the referral to have been withdrawn.

(4) 1 the proposal was not referred by the proponent, the Authority must obtain the consent of the proponent before sending notice under subsection (3).

[Section 38A inserted: No. 54 of 2003 s. 7.]

39. Authority to keep records of all proposals referred to it

(1) The Authority shall, subject to ~~this section~~ the publication regulations, keep a public record of each proposal referred to it under section 38 and shall in that public record set out —

(aa) any additional information about that proposal provided to the Authority under section 38A; and

- (a) whether or not that proposal is to be assessed under this Part; and
- (b) if that proposal is to be assessed under this Part, the level of that assessment and such other details as are prescribed.


~~(2) The proponent of a proposal which is referred to the Authority under section 38 may at the time of that referral or at any subsequent time request the Authority not to keep a public record under subsection (1) of the whole or any part of that proposal by reason of the confidential nature of any of the matters contained in that whole or part.~~

~~(3) When a request is made under subsection (2), the Authority —~~

~~(a) shall, if the whole or part of the proposal to which the request relates contains particulars of —~~

~~(i) a secret formula or process; or~~

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 Number: 1 Author: CME WA Subject: Highlight Date: 14/01/2020 10:32:48 AM

What happens if the proponent does not provide consent? If the subsequent pathway sufficiently clear in the drafting?

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s. 39A


- ~~_____ (ii) the cash consideration offered for the acquisition of shares in the capital, or assets, of a body corporate; or~~
- ~~_____ (iii) the current costs of manufacturing, producing or marketing goods or services;~~
- ~~_____ or~~
- ~~_____ (b) may, if the whole or part of the proposal to which the request relates does not contain any particulars referred to in paragraph (a), but the Authority is satisfied that it is desirable to do so by reason of the confidential nature of the matters contained in that whole or part,~~
- ~~_____ refrain from keeping a public record under subsection (1) of that whole or part.~~
- ~~_____ (4) If a request is made under subsection (2), the Authority shall refrain from keeping a public record under subsection (1) of the whole or part of the proposal to which the request relates until the Authority has dealt with that request.~~
- ~~_____ (5) The Authority shall cause each public record kept by it under subsection (1) to be made available for public inspection under such conditions and at such places and times as are prescribed.~~
- ~~_____ [Section 39 amended: No. 23 of 1996 s. 19.]~~

39A. Authority must decide whether to assess referred proposals

- (1) ~~When~~ If a proposal ~~is~~ has been referred to the Authority under section 38, the Authority must, within 28 days after the referral of the proposal, is to decide whether or not to assess the proposal and give written notice of that decision —
 - (a) to the proponent; and
 - (b) if the proposal was not referred by the proponent, to the person that referred it; and
 - (c) to any relevant decision-making authority.

- (1A) Subsection (1) does not apply if —
- (a) under section 38AB, the referral is taken to have been withdrawn; or
 - (b) under section 38A(3), the referral has been declared to have been withdrawn; or
 - (c) the proposal is declared under section 39B to be a derived proposal.
- (2) The Authority's decision under subsection (1) is to be based on information —
- (a) submitted in or with the referral or under section 38A; or
 - (b) derived from the Authority's own investigations and inquiries.
- (3) ¹ 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.
- ~~(3) Within 28 days after the referral of the proposal the Authority is to give written notice of whether or not it is going to assess the proposal to —~~
- ~~(a) the proponent; and~~
 - ~~(b) if the proposal was not referred by the proponent, the person that referred it; and~~
 - ~~(c) any relevant decision-making authority.~~
- (4) If, for any reason, a relevant decision-making authority is not given notice as required by subsection (13)(c) that a proposal is going to be assessed, the Authority may give written notice to the decision-making authority under this subsection.
- (5) Notice under subsection (4) may be given by the Authority of its own motion or at the request of the decision-making authority, and may be given at any time before a report on the proposal is given to the Minister under section 44.

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 Number: 1 Author: CME WA Subject: Highlight Date: 14/01/2020
10:33:25 AM

CME supports this clarification.

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(6) If the Authority decides to assess a proposal, it is to begin the assessment as soon as practicable after the notices are given under subsection (13).

(7) If the Authority decides not to assess a proposal, it may nevertheless give advice and make recommendations on the environmental aspects of the proposal to the proponent or any other relevant person or authority.

~~(8) This section does not apply if the proposal is declared under section 39B to be a derived proposal.~~

[Section 39A inserted: No. 54 of 2003 s. 8.]

39AA. Nomination of person responsible for proposal

(1) This section applies to a proposal if —

(a) the proposal is referred, is required to be referred or ought to be referred to the Authority under section 38; and

(b) the Authority considers that the proposal should be assessed by it under this Part.

(2) Except when the responsibility for a proposal is imposed on a public authority under another written law, the Authority must nominate a person as being responsible for the proposal.

(3) If an individual is nominated under subsection (2), the nomination may be made —

(a) by reference to the individual's name; or

(b) by reference to the individual being the person for the time being holding or acting in a particular office or position.

(4) Written notice of a nomination under subsection (2) must be served on —


(a) the person nominated; and

(b) any relevant decision-making authority.

39AB. Change of person responsible for proposal

- (1) If the person nominated under section 39AA(2) ceases to have responsibility for a proposal, that person is to give the Authority written notice advising the name of the person to whom or which responsibility for the proposal will pass or has passed.
- (2) The Authority, may —
- (a) revoke a nomination under section 39AA(2) in relation to a proposal; and
- (b) ¹minate another person under section 39AA(2) in relation to the proposal.
- (3) Subsection (2) applies even if —
- (a) no written notice has been given to the Authority under subsection (1); or
- (b) the person mentioned in subsection (2)(b) is not the person named in a written notice given to the Authority under subsection (1).
- (4) Subsections (1) and (2) apply even if a report on the proposal has been published under section 44(3) or a statement has been published under section 45(5)(b) but, if a statement has been published, the powers conferred by subsection (2) are to be exercised by the Minister.
- (5) Subsections (1) and (2) do not apply if the assessment of the proposal has been terminated under section 40A.
- ² ³ For the purposes of subsections (1) and (2) and section 3(2b), a person that has been notified under section 39A(3)(a) that the Authority is going to assess a proposal is to be regarded as having been nominated under section 39AA(2) as being responsible for the proposal whether or not such a nomination has been made.


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 Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020 1:45:49 PM

Seems to provide for the EPA to nominate a responsible person regardless of the nomination from the proponent? Is this the intent and what if the proponent disagrees with the EPA?

 Number: 2 Author: CME WA Subject: Comment on Text Date: 14/01/2020 10:51:54 AM

Reference in (6) to s39A(3)(a) is incorrect as 39A(3)(a) has been deleted. Suggest this should instead now refer to 39A(1)(a).

 Number: 3 Author: CME WA Subject: Highlight Date: 14/01/2020 10:49:36 AM

This section is circular once you follow through with the Terms defined and other section references. Redrafting is recommended to ease understanding and clarity.

39B. 1 Strategic assessments and derived proposals

(1A) This section applies if —

- (a) there has been an assessment under this Division (the *strategic assessment*) of a strategic proposal (the *strategic proposal*); and
 - (b) a statement has been published under section 45(5)(b) in relation to the strategic proposal.
- (1) If this section applies and a proposal (the *referred proposal*) is referred to the Authority under section 38 the proponent may request the Authority in writing to declare the referred proposal to be a derived proposal.
- (2) If the proposal is referred by the proponent, a request under subsection (1) may be made in the referral.
- (3) If a request under subsection (1) is made, the Authority is to declare the referred proposal to be a derived proposal if it considers that —
- (a) the referred proposal was identified in ~~a the~~ strategic proposal ~~that has been assessed under this Part (the *strategic proposal*)~~; and
 - (b) ~~after a report on the strategic proposal was published under section 44(3), in the implementation agreement or decision set out in the statement mentioned in subsection (1A)(b)~~ it was agreed or decided ~~under section 45~~ that the referred proposal could be implemented, or could be implemented subject to conditions and procedures agreed or decided under ~~that~~ section 45.
- (4) Despite subsection (3), the Authority may refuse to declare the referred proposal to be a derived proposal if it considers that —
- (a) environmental issues raised by the proposal were not adequately assessed ~~when in~~ the strategic ~~proposal was assessed~~ assessment; or
 - (b) there is significant new or additional information that justifies the reassessment of the issues raised by the proposal; or

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Number: 1 Author: CME WA Subject: Highlight Date: 27/01/2020 9:04:29 AM

Redrafting is recommended for clarity. It is still not clear how s41, 45C, and 46 to 46C relate to strategic assessments and derived proposals.

As per earlier comment, recommend Part IV be redrafted and re-organised including to more expressly and clearly address requirements for strategic assessments and derived proposals.

CME also recommends:

A clause be added under s39B providing a statutory timeframe for the EPA to declare whether a referred proposal is a derived proposal;

Powers be added such that there is provision for strategic assessments and conditions to be updated if significant new information becomes available (without any retrospective impact on previously derived proposals that are already approved). This would facilitate keeping the strategic assessment contemporary and usable rather than risk eliminating all future chance of successful derived proposals due to the emergence of new environmental factors or contemporary condition requirements; and

In circumstances where the criteria in s39B(4) are met, allow assessment to the relevant new issues, information or change thereby permitting new issues to be assessed whilst ensuring issues already addressed in the strategic assessment avoid re-assessment.

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39B. Strategic assessments and derived proposals

(1A) This section applies if —

- (a) there has been an assessment under this Division (the *strategic assessment*) of a strategic proposal (the *strategic proposal*); and
 - (b) a statement has been published under section 45(5)(b) in relation to the strategic proposal.
- (1) If this section applies and a proposal (the *referred proposal*) is referred to the Authority under section 38 the proponent may request the Authority in writing to declare the referred proposal to be a derived proposal.
- (2) If the proposal is referred by the proponent, a request under subsection (1) may be made in the referral.
- (3) If a request under subsection (1) is made, the Authority is to declare the referred proposal to be a derived proposal if it considers that —
- (a) the referred proposal was identified in ~~a the~~ strategic proposal ~~that has been assessed under this Part (the *strategic proposal*)~~; and
 - (b) ~~after a report on the strategic proposal was published under section 44(3), in the implementation agreement or decision set out in the statement mentioned in subsection (1A)(b)~~ it was agreed or decided ~~under section 45~~ that the referred proposal could be implemented, or could be implemented subject to conditions and procedures agreed or decided under ~~that~~ section 45.
- (4) Despite subsection (3), the Authority may refuse to declare the referred proposal to be a derived proposal if it considers that —
- (a) environmental issues raised by the proposal were not adequately assessed ~~when in~~ the strategic ~~proposal was assessed~~ assessment; or
 - (b) there is significant new or additional information that justifies the reassessment of the issues raised by the proposal; or

- (c) there has been a significant change in the relevant environmental factors since the strategic ~~proposal was assessed~~ assessment was completed.
- (5) If the Authority declares the referred proposal to be a derived proposal, it is to —
 - (a) record the declaration in the public record kept under section 39(1); and
 - (b) give written notice of the declaration to the Minister.
- (6) If the Authority declares the referred proposal to be a derived proposal, it is not to assess the proposal except for the purposes of conducting an inquiry under section 46(4).
- (7) If the Authority refuses to declare the referred proposal to be a derived proposal it is to give written notice of the refusal to the proponent.
- (8) The notice may be included in the notice given under section 39A(3)(a).
- (9) For the purposes of this section it does not matter whether the proponent of the referred proposal was, or was not, the proponent of the strategic proposal.

[Section 39B inserted: No. 54 of 2003 s. 8.]

40. Assessing referred proposals

- (1) This section and section 40A apply if the Authority assesses a proposal.
 - (1A) **1** the proposal being assessed is a significant amendment of an approved proposal the Authority must assess it in the context of the approved proposal and have regard to the cumulative impacts that the implementation of the approved proposal and the significant amendment might have on the environment.
- (2) The Authority may, for the purposes of assessing a proposal —
 - (a) require any person to provide it with such information as is specified in that requirement; or

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Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020
1:47:47 PM

CME is concerned with the specific wording of this clause and potential for unintended and unreasonable consequences and subsequent legal challenge / invalidity.

This provision is inflexible and does not have regard to the fact that limited environmental data may be available for historically approved projects as information requests for impact assessment always change over time. A recent example where approval for a revised proposal was sought included consideration of subterranean fauna. However, subterranean fauna was not a factor when the original project was approved and there are not data available on the historical subterranean fauna status associated with the original proposal. The proposed amendment opens up an avenue for legal challenge of assessments where consideration of historical impacts is unreasonably difficult or not possible. Importantly, note that previous proposal may pre-date Part IV and pre-date the discovery of certain species and hence knowledge of these is unreasonable (impossible).

Further, environmental baseline described the current state of the environment and the conservation significance of species and ecological communities based on their rarity and threats; therefore, historical impacts are already taken into account in an impact assessment and there is a risk of double counting these impacts if historical impacts are included in a cumulative impact assessment (usually limited to reasonably foreseeable future projects).

Recommend change 'must' to 'may' to enable the reasonable

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- (c) there has been a significant change in the relevant environmental factors since the strategic ~~proposal was assessed~~ assessment was completed.
- (5) If the Authority declares the referred proposal to be a derived proposal, it is to —
 - (a) record the declaration in the public record kept under section 39(1); and
 - (b) give written notice of the declaration to the Minister.
- (6) If the Authority declares the referred proposal to be a derived proposal, it is not to assess the proposal except for the purposes of conducting an inquiry under section 46(4).
- (7) If the Authority refuses to declare the referred proposal to be a derived proposal it is to give written notice of the refusal to the proponent.
- (8) The notice may be included in the notice given under section 39A(3)(a).
- (9) For the purposes of this section it does not matter whether the proponent of the referred proposal was, or was not, the proponent of the strategic proposal.

[Section 39B inserted: No. 54 of 2003 s. 8.]

40. Assessing referred proposals

- (1) This section and section 40A apply if the Authority assesses a proposal.
- (1A) If the proposal being assessed is a significant amendment of an approved proposal the Authority must assess it in the context of the approved proposal and have regard to the cumulative impacts that the implementation of the approved proposal and the significant amendment might have on the environment.
- (2) The Authority may, for the purposes of assessing a proposal —
 - (a) require any person to provide it with such information as is specified in that requirement; or

application of this provision where it is practicable, significant and of environmental benefit.

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- (aa) require the proponent to provide to the Authority a contaminated sites auditor's report on the proposal, which complies with any relevant regulations made under the *Contaminated Sites Act 2003*; or
 - (b) require the proponent to undertake an environmental review and to report thereon to the Authority; or
 - (c) with the approval of the Minister and subject to section 42, conduct a public inquiry in such manner as it sees fit or appoint a committee consisting of —
 - (i) Authority members; or
 - (ii) Authority members and persons other than Authority members; or
 - (iii) persons other than Authority members, to conduct a public inquiry and report to the Authority on its findings on the public inquiry.
- (2a) As well as taking one or more of the courses of action set out in subsection (2)(a) to (c), the Authority may make such other investigations and inquiries as it thinks fit.
- (3) Subject to any direction made under section 43, the Authority shall determine the form, content, timing and procedure of any environmental review required to be undertaken under subsection (2)(b).
- (4) Subject to any direction made under section 43 and to [the publication regulations](#) ~~subsection (5)~~, the Authority may cause [to be published in a prescribed manner](#) —
- (a) any information or report provided in compliance with a requirement made under subsection (2)(a) or (aa); or
 - (b) any report made in compliance with a requirement made under subsection (2)(b).⁵
- [\(5\) When publishing information or a report under subsection \(4\) the Authority may —](#)
- [\(a\) declare the information or report to be available for public review; and](#)

- (b) specify the period within which, the extent to which and the manner in which public authorities or persons may make submissions to the Authority in respect of the information or report.
- ~~to be made available for public review and shall, if it does so, determine the period within which, the extent to which and the manner in which public authorities or persons may make submissions to the Authority in respect of that information or report.~~
- ~~(5) If any information relating to a manufacturing process or trade secret used in carrying on or operating any particular undertaking or equipment (in this subsection called the **confidential information**) is contained in —~~
- ~~(a) any information referred to in subsection (4)(a); or~~
- ~~(b) any report referred to in subsection (4)(b);~~
- ~~the Authority shall before causing the information referred to in paragraph (a) or the report referred to in paragraph (b) to be made available for public review under subsection (4) exclude the confidential information from that information or report.~~
- (6) When the Authority ~~causes~~ declares any information or report to be ~~made~~ available for public review under subsection (54) —
- (a) the proponent must, subject to the publication regulations —
- (i) at the proponent's own expense, publish notice in a prescribed manner of that information or report being available for public review; and
- ~~(i) at the proponent's own expense and to the satisfaction of the Authority, make copies of that information or report and advertise its availability for public review; and~~
- (ii) provide copies of that information or report free of charge to such public authorities and persons, at such places and times as the Authority determines; and

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- (iii) provide copies of that information or report to members of the public at such places and times, and at a price not exceeding such maximum price, as the Authority determines;
 - and
 - (b) the Authority may require the proponent to respond to any submissions made to the Authority in respect of that information or report in such manner as the Authority thinks fit.
- (7) A committee appointed under subsection (2)(c) shall —
- (a) conduct a public inquiry in respect of the proposal concerned; and
 - (b) after holding the public inquiry referred to in paragraph (a), report to the Authority on its findings on that public inquiry.
- (8) The ¹airman and other members of a committee appointed under subsection (2)(c) shall each of them be paid such remuneration and travelling and other allowances as the Authority on the recommendation of the Public Sector Commissioner determines in ² case.
- (9) A proponent or other person upon whom a requirement is imposed under subsection (2)(a), (aa) or (b) or (6)(b) has to comply with that requirement.

[Section 40 amended: No. 57 of 1997 s. 54(2); No. 14 of 1998 s. 37; No. 54 of 2003 s. 9; No. 60 of 2003 s. 100 (as amended: No. 40 of 2005 s. 13(2) and (3)); No. 39 of 2010 s. 89.]


40A. Termination of assessment

- (1) The Authority may terminate the assessment of a proposal if —
- (a) the proponent agrees with the termination; or
 - (aa) the Authority receives written notice from the proponent that the proponent does not wish to proceed with the proposal; or

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 Number: 1 Author: CME WA Subject: Highlight Date: 14/01/2020
11:04:23 AM

Change 'chairman' to 'chairperson' or 'chair'

 Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020
2:13:57 PM

Change 'his' to 'their' or 'his / her'

- (b) the proponent has failed to comply with —
 - (i) a requirement made under section 40(2)(a) or (b); or
 - (ii) section 40(6)(a); or
 - (iii) a requirement made under section 40(6)(b), within such period as the Authority considers to be reasonable in the circumstances; or
 - (c) **1** decision-making authority has refused to approve the proposal.
- (2) Subsection (1)(c) does not authorise the termination of the assessment if the refusal by the decision-making authority —
- (a) is being appealed against or reviewed under an enactment; or
 - (b) is capable of being appealed against or reviewed under an enactment.

[Section 40A inserted: No. 54 of 2003 s. 10.]

40B. Application of sections 41, 41A, 44 and 45 to strategic proposals and strategic assessments

- (1) Sections 41, 41A and 45(7) do not apply in relation to a strategic proposal.
- (2) Section 44 and section 45 (other than subsection (7)) apply in relation to a strategic proposal as if references in them to implementation were references to the implementation of a future proposal identified in the strategic proposal in the event of that future proposal being declared under section 39B to be a derived proposal.
- (3) This section does not affect the application of sections 41, 41A, 44 and 45 in relation to a strategic proposal to the extent to which the strategic proposal is itself a significant proposal.

[Section 40B inserted: No. 54 of 2003 s. 10.]

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📄 Number: 1 Author: CME WA Subject: Highlight Date: 24/01/2020 3:59:31 PM

Is it clear that this only holds where the DMA actually has the authority to 'refuse' (versus 'approve') a proposal in a substantive way? It is possible to be a DMA without the the DMA having the ability to approve / refuse a proposal (or potentially just a part of a proposal). It may also be possible to amend a proposal to remove a DMA (entirely).

41. Decision-making authority not to approve proposal until certain events occur

[(1) deleted]

(2) A decision-making authority that —

- (a) has referred a proposal to the Authority under ~~or in compliance with a requirement made under~~, section 38; or
- (b) has been required under section 38 ~~(2)~~ (5c) to refer a proposal to the Authority,

shall not make any decision that could have the effect of causing or allowing the proposal to be implemented until —


- (c) it is informed under section 39A(3)(b) that the Authority is not going to assess the proposal and the period within which an appeal against the decision that the proposal not be assessed ~~that decision~~ may be lodged under section 100(1) has expired without the lodging of such an appeal or, if such an appeal has been lodged within that period, that appeal has been determined; or
- (d) an authority is served on it under section 45(7),

as the case requires.

(3) Without limiting subsection (2), a decision-making authority that has been given notice under section 1A(3)(c) or (4) that a proposal is going to be or is being assessed is not to make any decision that could have the effect of causing or allowing the proposal to be implemented without having had an authority under section 45(7) served on it.

(4) Subsections (2) and (3) do not apply to a decision in relation to a proposal if the effect of the decision would be to cause or allow the doing of minor or preliminary work to which the Authority has consented under section 41A(3).

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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020
2:13:49 PM

Does not exist. Recommend change to 'section 39A(1)(c)'

- [Section 41 amended: No. 54 of 2003 s. 11; No. 40 of 2010 s. 14.]

41A. Proposal not to be implemented before action under s. 45 taken

- (1) If a decision of the Authority that a proposal is to be assessed has been set out in the public record under section 39, a person who does anything to implement the proposal before a statement is published under section 45(5)(b) or a notification is given under section 45(8) commits an offence.
- (2) Subsection (1) applies even if the assessment of the proposal has been terminated under section 40A and applies as if the references to section 45(5)(b) and (8) were references to the application of those provisions to any ~~revised or further~~ new proposal referred to the Authority under section 38 ² place of the terminated proposal as mentioned in section 38(1)(aa).
- (3) Subsection (1) does not apply to minor or preliminary work done with the Authority's consent.
- (4) If the proposal being, or to be, assessed is a significant amendment of an approved proposal, subsection (1) does not apply to the doing of anything to implement the approved proposal.

[Section 41A inserted: No. 54 of 2003 s. 12.]

42. Conduct of public inquiries under s. 40(2)(c)

- (1) The *Royal Commissions Act 1968* applies to and in relation to a public inquiry conducted under section 40(2)(c) as if references in that Act to —
- (a) a Commission were references to the Authority or to the relevant committee; and

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Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020 1:50:25 PM

Support the intent of this amendment, subject to comments below.

The definition in s3(1) for significant amendment is: "significant amendment of an approved proposal means a significant proposal, as defined in s37B, that is or includes the amendment of an "approved proposal".

Given that this definition in s3(1) links back to the approved proposal and then includes the amendment, does the drafting of this clause still work (how does it clearly exclude the approved proposal?).

Suggest that this is amended to clarify that subsections (2) and (3) only apply to a decision in relation to the significant amendment to the approved proposal.

Number: 2 Author: CME WA Subject: Highlight Date: 16/01/2020 11:09:17 AM

This amendment does not make sense as s40A(1)(aa) refers only to the termination of a proposal at the request of the proponent, and does not refer to a new proposal referred under s38. Recommend change to "in place of a proposal terminated under s40(A)(1)(aa)."

Number: 3 Author: CME WA Subject: Highlight Date: 25/01/2020 1:49:27 PM

This amendment does not make sense as s40A(1)(aa) refers only to the termination of a proposal at the request of the proponent and does not refer to a new proposal referred under s38. Recommend change to "[...] any new proposal referred to the EPA under s8 in place of a proposal

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- (5) If the proposal being, or to be, assessed is a significant amendment of an approved proposal, subsections (2) and (3) do not apply to a decision in relation to the approved proposal.

[Section 41 amended: No. 54 of 2003 s. 11; No. 40 of 2010 s. 14.]

41A. Proposal not to be implemented before action under s. 45 taken

- (1) If a decision of the Authority that a proposal is to be assessed has been set out in the public record under section 39, a person who does anything to implement the proposal before a statement is published under section 45(5)(b) or a notification is given under section 45(8) commits an offence.
- (2) Subsection (1) applies even if the assessment of the proposal has been terminated under section 40A and applies as if the references to section 45(5)(b) and (8) were references to the application of those provisions to any ~~revised or further new~~ proposal referred to the Authority under section 38 ~~in place of the terminated proposal~~ as mentioned in section 40A(1)(aa).
- (3) Subsection (1) does not apply to minor or preliminary work done with the Authority's consent.
- (4) ~~4~~ the proposal being, or to be, assessed is a significant amendment of an approved proposal, subsection (1) does not apply to the doing of anything to implement the approved proposal.

[Section 41A inserted: No. 54 of 2003 s. 12.]

42. Conduct of public inquiries under s. 40(2)(c)

- (1) The *Royal Commissions Act 1968* applies to and in relation to a public inquiry conducted under section 40(2)(c) as if references in that Act to —
- (a) a Commission were references to the Authority or to the relevant committee; and

terminated under s40(A)(1)(aa)."

📄 Number: 4 Author: CME WA Subject: Highlight Date: 25/01/2020
1:52:39 PM

See comments under s45(5) regarding definition for significant amendment. Suggest that this is amended to clarify that subsections (1) only applies to a decision in relation to the significant amendment to the approved proposal.

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- (b) the Chairman were references to the ¹chairman of the Authority or to the ²chairman of the relevant committee; and
 - (c) a Commissioner were references to an Authority member or to a member of the relevant committee, appointed under that section.
- (2) The Authority shall, after conducting a public inquiry under section 40(2)(c) or considering the report of the relevant committee appointed under that section to conduct a public inquiry, as the case requires, incorporate the findings made by it —
 - (a) on the public inquiry conducted by it; or
 - (b) on that report,as the case requires, in the report prepared by it under section 44.


43. Minister may direct Authority as to assessing proposal

- (1) The Minister may —
 - (a) if the Authority considers that a proposal referred to it under section 38 should not be assessed by it under this Part; or
 - (b) during or after the assessment by the Authority of a proposal referred to it under that section,and after consulting the Authority, direct the Authority to assess that proposal, or to assess or re-assess that proposal more fully or more publicly or both, as the case requires, in accordance with that direction, and the Authority shall comply with that direction.
- (2) Sections 39, 39A(3), 40(2) ~~to, (3), (4), (5), (6), (7), and~~ (8), 41, 42 and 44 apply to the assessment or reassessment of a proposal under a direction given under subsection (1) as if that direction were a referral under section 38 of the proposal.

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 Number: 1 Author: CME WA Subject: Highlight Date: 24/01/2020
4:01:20 PM

Change 'Chairman' to 'Chairperson'

 Number: 2 Author: CME WA Subject: Highlight Date: 24/01/2020
4:01:28 PM

Change 'chairman' to 'chairperson'

- (3) A direction cannot be given under subsection (1) if a statement has been served under section 45(5)(a) or a notification has been given under section 45(8).

(3A) 1 direction can be given under subsection (1) even if the Minister has dismissed an appeal under section 100(1)(a) against a decision by the Authority that the proposal is not to be assessed.

- (4) The Minister is to cause copies of the reasons for giving a direction under subsection (1) to be —
- (a) given to the Authority; and
 - (b) 2 blished as soon as practicable after the direction is given.

[Section 43 amended: No. 57 of 1997 s. 54(3); No. 54 of 2003 s. 13.]

3 A. Amendments ~~Changes~~ to proposals during assessment

~~While a proposal is being assessed, the Authority may consent to the proponent changing the proposal without a revised proposal being referred to the Authority under this Part if the Authority considers that the change is unlikely to significantly increase any impact that the proposal may have on the environment.~~

(1) While a proposal is being assessed, the proponent may, by written notice (the *notice*) —

- (a) advise the Authority that the proponent wishes to amend the proposal in the manner set out in the notice; and
- (b) request that the Authority approve of the assessment of the proposal being completed in respect of the proposal as so amended.

(2) The Authority may, at its discretion, give or refuse to give approval under subsection (1)(b).

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Number: 1 Author: CME WA Subject: Highlight Date: 14/01/2020 11:49:02 AM

This appears to leave a trailing risk for not-assessed projects, that can no longer be closed out by Ministerial determination of an appeal. Recommend this amendment be redrafted so that the Ministerial power to direct the EPA to re-assess a proposal is closed out following determination of an appeal against a not-assessed decision that upholds the not assessed decision.

Number: 2 Author: CME WA Subject: Highlight Date: 16/01/2020 11:21:57 AM

Recommend change to "published in a prescribed manner as soon as practicable after the direction is given."

Number: 3 Author: CME WA Subject: Highlight Date: 25/01/2020 1:53:51 PM

Support that the ability for a proponent to request to amend a proposal during assessment is no longer linked to the significance of the amendment. This will reduce regulatory burden and does not increase risk to the environment as the EPA has full flexibility to reject the change, increase the level of assessment, or change the scoping document (i.e. repeal functions).

The EPA's discretion and powers to give or refuse to give approval for amendments to the proposal during assessment should be proportionate to the proposed amendment. This increased discretion presents a risk that inconsistency could arise in EPA decisions. A right of appeal against the EPA's decision is recommended.

Comments from page 87 continued on next page

- (3) A direction cannot be given under subsection (1) if a statement has been served under section 45(5)(a) or a notification has been given under section 45(8).

(3A) A direction can be given under subsection (1) even if the Minister has dismissed an appeal under section 100(1)(a) against a decision by the Authority that the proposal is not to be assessed.

- (4) The Minister is to cause copies of the reasons for giving a direction under subsection (1) to be —
- (a) given to the Authority; and
 - (b) published as soon as practicable after the direction is given.

[Section 43 amended: No. 57 of 1997 s. 54(3); No. 54 of 2003 s. 13.]

43A. Amendments ~~Changes~~ to proposals during assessment

~~While a proposal is being assessed, the Authority may consent to the proponent changing the proposal without a revised proposal being referred to the Authority under this Part if the Authority considers that the change is unlikely to significantly increase any impact that the proposal may have on the environment.~~

(1) While a proposal is being assessed, the proponent may, by written notice (the *notice*) —

- (a) advise the Authority that the proponent wishes to amend the proposal in the manner set out in the notice; and
- (b) request that the Authority approve of the assessment of the proposal being completed in respect of the proposal as so amended.

(2) The Authority may, at its discretion, give or refuse to give approval under subsection (1)(b).

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Division 1 Referral and assessment of proposals

s. 44

(3) If the Authority gives approval under subsection (1)(b) —

(a) the proposal as so amended is taken to have been referred to the Authority under section 38; and

(b) if it thinks fit, the Authority may perform, or perform again, any function that it could have performed, or has already performed, in respect of the proposal.

[Section 43A inserted: No. 54 of 2003 s. 14.]

44. Report by Authority on assessment of proposal

(1) If the Authority assesses a proposal, it is to prepare a report on the outcome of its assessment of the proposal and give that report (the **assessment report**) to the Minister.

(2) The assessment report must set out —

(a) what the Authority considers to be the key environmental factors identified in the course of the assessment; and


(b) the Authority's recommendations as to whether or not the proposal may be implemented and, if it recommends that implementation be allowed, as to the conditions and procedures, if any, to which implementation should be subject.


(1A) 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.

(2a) The Authority may, if it thinks fit, include other information, advice and recommendations in the assessment report.

(2b) Subject to subsection (2d), the assessment report may be given to the Minister at any time but, so far as is practicable, it must be given not later than 6 weeks after the Authority completes its assessment or **2** **assessment** of the proposal.

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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020 2:12:42 PM
Support.

 Number: 2 Author: CME WA Subject: Highlight Date: 15/01/2020 9:45:06 AM

This is the first use of 'reassessment' (assumed to be referring to if the Minister remits an assessment back to the EPA following an appeal for 'reassessment').

Does 'reassessment' need to be defined or specified? Which of the other sections relates / is relevant to reassessment? If redrafting of Part IV is pursued, perhaps there is a clean / clear way to define or refer to reassessment and make clear which parts of Part IV do and do not apply to a reassessment.


- (2c) The Minister may, after consulting the Authority, direct the Authority to prepare the assessment report and give it to the Minister —
- (a) within a specified period after the day on which —
 - (i) the proposal was referred to the Authority under section 38; or
 - (ii) a direction was given to the Authority under section 43(1),
as the case requires; or
 - (b) before a specified date.
- (2d) If a direction is given under subsection (2c) the Authority must give the assessment report to the Minister within the specified period or before the specified date.
- (3) The Minister shall, as soon as **1** is reasonably able to do so after receiving copies of the assessment report, simultaneously cause —
- (a) that report to be published [in a prescribed manner](#); and
 - (b) copies of that report to be given to —
 - (i) any other Minister appearing to **2m** to be likely to be concerned in the outcome of the proposal to which that report relates; and
 - (ii) each decision-making authority, if any, by which the proposal to which that report relates was referred to the Authority or which had been given notice under section **3**A(3)(c) or (4) in relation to the proposal; and
 - (iii) if the proposal to which that report relates was referred to the Authority by the proponent or another person, to the proponent or the other person.

[Section 44 amended: No. 54 of 2003 s. 15.]

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 Number: 1 Author: CME WA Subject: Highlight Date: 16/01/2020 11:24:32 AM

Change 'he' to 'he / she' or 'they'

 Number: 2 Author: CME WA Subject: Highlight Date: 16/01/2020 11:24:40 AM

Change 'him' to 'him / her' or 'them'

 Number: 3 Author: CME WA Subject: Highlight Date: 13/01/2020 2:12:33 PM

Does not exist. Recommend change to 'section 39A(1)(c)'

Division 2 — Implementation of proposals

45. Procedure for deciding if proposal may be implemented

(1) In this section —

assessed proposal means the proposal to which the report relates;

DMA decision means a decision of a decision-making authority that could have the effect of causing or allowing the assessed proposal to be implemented;

implementation issue means —

(a) whether or not the assessed proposal may be implemented; and

(b) the conditions and procedures, if any, to which the assessed proposal, if implemented, should be subject;

key decision-making authority means a decision-making authority determined by the Minister under subsection (1B) to have a major role in making decisions in relation to matters in

the proposal that may have significant impacts on the environment;

report has the meaning given in subsection (1A).

(1A+) This section applies after tThe Minister ~~shall, after he~~ has caused a report (**the report**) to be published under section 44(3)(a). —

(1B) For the purposes of this section the Minister is to determine which or whom of the decision-making authorities in relation to the proposal has a major role, or have major roles, in making decisions in relation to matters in the proposal that may have significant impacts on the environment.

(1Ca) If the **key** decision-making authority, or one or more of the **key** decision-making authorities, ~~to which or whom a copy or copies of the report has or have been given under that section~~ is or are another Minister or other Ministers, **the Minister must** consult **and, if possible, agree with** that Minister or those Ministers **on**

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Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020
1:55:07 PM

Support, in principle, the amendments to s45 to allow key DMAs relevant to the proposal and its environmental impacts to be identified and to limit statutory consultation requirements to those key DMAs identified by the Minister. However, previous comments must be considered (see section 1.1) regarding the definition of DMAs and the introduction of two tiers of DMAs, and either (i) simplification of the definition of a DMA, or (ii) redrafting of s45 be implemented. Current drafting of s45 does not clearly articulate how the two tiers of DMAs (key and non-key) must function when deciding if a proposal may be implemented (see further comments in Appendix II).

The intent of streamlining regulatory processes is strongly supported, however it is noted that this provision presents the risk that some DMAs (which may be considered relevant to the proposal) may be actively excluded.

Number: 2 Author: CME WA Subject: Highlight Date: 25/01/2020
1:55:29 PM

The term 'assessed proposal' is used in other sections beyond s45. Should be defined as a term used in s3 or else in s37B at the start of Part IV given wider use beyond s45.

Number: 3 Author: CME WA Subject: Highlight Date: 16/01/2020
11:26:25 AM

Is this a 'significant proposal'

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on next page

Division 2 — Implementation of proposals

45. Procedure for deciding if proposal may be implemented

(1) In this section —

assessed proposal means the proposal to which the report relates;

DMA decision means a decision of a decision-making authority that could have the effect of causing or allowing the assessed proposal to be implemented;

implementation issue means —

(a) whether or not the assessed proposal may be implemented; and

(b) the conditions and procedures, if any, to which the assessed proposal, if implemented, should be subject;

key decision-making authority means a decision-making authority determined by the Minister under subsection (1B) to have a major role in making decisions in relation to matters in the proposal that may have significant impacts on the environment;

report has the meaning given in subsection (1A).

(1A+) This section applies after t~~The Minister shall, after he~~ has caused a report (the report) to be published under section 44(3)(a). —

(1B) For the purposes of this section the Minister is to determine which or whom of the decision-making authorities in relation to the proposal has a major role, or have major roles, in making decisions in relation to matters in the proposal that may have significant impacts on the environment.

(1Ca) If the key decision-making authority, or one or more of the key decision-making authorities,~~to which or whom a copy or copies of the report has or have been given under that section~~ is or are another Minister or other Ministers, the Minister must consult and, if possible, agree with that Minister or those Ministers on

~~the implementation issues, and, if possible, agree with him or them; or~~

- (1D**b**) **1** neither the key decision-making authority, nor any of the key decision-making authorities, as the case requires, ~~referred to in paragraph (a)~~ is another Minister, the Minister must consult and, if possible, agree with that decision-making authority or those decision-making authorities on the implementation issues.

~~on whether or not the proposal to which the report relates may be implemented and, if that proposal may be implemented, to what conditions and procedures, if any, that implementation should be subject.~~

- (2) If the Minister and the other Minister or Ministers referred to in subsection (1**C**)(a) cannot agree on an implementation issue ~~any of the matters referred to in subsection (1)~~, the Minister shall refer the matter or matters in dispute to the Governor for ~~his~~ decision, and the decision of the Governor on that matter or matters shall be final and without appeal.
- (3) If the Minister and the **2** decision-making authority or decision-making authorities referred to in subsection (1D)(b) cannot agree on an implementation issue ~~any of the matters referred to in subsection (1)~~, the Minister shall appoint an appeals committee to consider and report to ~~him~~ the Minister on the matter or matters in dispute **3**
- (4) Sections 106, 107, 108, 109 and 110 apply to and in relation to a matter in respect of which the Minister has appointed an appeals committee under subsection (3) as if that matter were the subject of an appeal from a decision of the Minister.
- (5) If the implementation agreement or decision is that the assessed proposal may be implemented, or may be implemented subject to implementation conditions, the Minister is to —
- (a) cause copies of a statement setting out the implementation agreement or decision to be served on —
 - (i) the Authority; and

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Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020
1:56:18 PM

See previous comments regarding the introduction of two tiers of DMAs.

Number: 2 Author: CME WA Subject: Highlight Date: 15/01/2020
2:18:42 PM

Are these meant to be KDMAs or is 1D actually about DMAs?

Number: 3 Author: CME WA Subject: Highlight Date: 25/01/2020
1:56:49 PM

What happens if there are no key DMAs? (There is nothing in the proposed draft that explicitly requires at least one key DMA) - also, it may be that for amendments, none of the key DMAs from the original proposal are relevant as key DMAs?

Also, what if there is a key DMA that is not a Minister but also a DMA that is a Minister? Therefore the role of the DMA Minister as a Minister and the process through the Governor has been demoted by a key DMA that is not a Minister. Is that intentional / appropriate?

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(ii) each key decision-making authority and any other decision-making authority to which or whom notice of the Authority's decision to assess the proposal was sent under section 1A ~~that was consulted under subsection (1); and~~

(iii) the proponent of the assessed proposal; and

(iv) the person who referred the assessed proposal (if it was not referred by a person referred to in subparagraph (ii) or (iii));

and

(b) cause the statement to be published in a prescribed manner as soon as is practicable after it is served under paragraph (a).

(5AA) In the case of a significant amendment of an approved proposal the statement under subsection (5) may be in the form of a statement that includes the implementation conditions for the approved proposal as amended by the significant amendment.


(5A) Subsection (5B) and sections 2AA set out some kinds of implementation conditions that may be imposed in relation to the assessed proposal, but nothing in subsection (5B) or section 3AA prevents any other implementation condition from being imposed.

(4) The following 5 sets out things the proponent of the assessed proposal can be required to do (at the proponent's expense) under implementation conditions —


(a) substantially commence implementation of the proposal within a specified period or before a specified date;

(b) take environmental protection, abatement or restoration measures on the subject land, or elsewhere, in order to offset the impacts of the implementation of the proposal, on the environment or make monetary contributions to a fund maintained for the purpose of taking environmental protection, abatement or restoration measures;


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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020 2:11:55 PM


Needs to specify - Recommend change to 'section 39A(1) and 39A(4)'

 Number: 2 Author: CME WA Subject: Highlight Date: 25/01/2020 1:57:30 PM


Does not exist. Recommend remove reference to s45AA as subsection 5B details the only list of implementation conditions within the Act.

 Number: 3 Author: CME WA Subject: Highlight Date: 25/01/2020 1:57:37 PM

Does not exist. Recommend remove reference to s45AA as subsection 5B details the only list of implementation conditions within the Act.

 Number: 4 Author: CME WA Subject: Highlight Date: 25/01/2020 1:57:45 PM

Recommend this subsection in a standalone section as it does not need to be under s45C which is titled 'the procedure for deciding if proposal may be implemented'. This clause is not procedurally focussed.

 Number: 5 Author: CME WA Subject: Highlight Date: 13/01/2020 2:10:32 PM

Current wording implies this is an exclusive list. Suggested

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- (ii) each key decision-making authority and any other decision-making authority to which or whom notice of the Authority's decision to assess the proposal was sent under section 39A ~~that was consulted under subsection (1)~~; and
- (iii) the proponent of the assessed proposal; and
- (iv) the person who referred the assessed proposal (if it was not referred by a person referred to in subparagraph (ii) or (iii));

and

- (b) cause the statement to be published in a prescribed manner as soon as is practicable after it is served under paragraph (a).

(5AA) In the case of a significant amendment of an approved proposal the statement under subsection (5) may be in the form of a statement that includes the implementation conditions for the approved proposal as amended by the significant amendment.

(5A) Subsection (5B) and sections 45AA set out some kinds of implementation conditions that may be imposed in relation to the assessed proposal, but nothing in subsection (5B) or section 45AA prevents any other implementation condition from being imposed.

(5B) The following list sets out things the proponent of the assessed proposal can be required to do (at the proponent's expense) under implementation conditions —

- (a) **6** substantially commence implementation of the proposal within a specified period or before a specified date;
- (b) take environmental protection, abatement or restoration measures on the subject land, or elsewhere, in order to offset the impacts of the implementation of the proposal, on the environment or make monetary contributions to a fund maintained for the purpose of taking environmental protection, abatement or restoration measures;

rewording:

"The following list includes things the proponent of the assessed proposal[...]"

📄 Number: 6 Author: CME WA Subject: Highlight Date: 25/01/2020
1:58:53 PM

Do not support the proposed power to require proponents to 'substantially commence' a proposal within a specified period as it is not reasonable and not necessary for the protection of the environment. Proponents should continue to have flexibility as to whether and when they commence an approved proposal. Such a condition may put a proponent in a position whereby it breaches a condition (which is an offence under the s47 of the EP Act) in circumstances where it fails to 'substantially commence' a proposal by a date determined by the Minister. There are many circumstances where a proponent may need to delay the commencement of a proposal (including waiting for other regulatory processes outside of its control to occur). If this proposed amendment is merely intended to clarify the Minister's power to impose a time limit on commencement of an approved proposal (i.e. current practice), it is recommended that the proposed amendment be deleted and text be included elsewhere in s47 which simply confirms that an implementation condition may limit the period during which a proposal may be commenced (which limit can be extended by amendment to the implementation condition).

- (c) give an environmental undertaking in relation to land
other than the subject land; or
- (d) arrange for an environmental protection covenant to be
given by a specified person other than the proponent in
relation to land other the subject land;
- (2) prepare, implement and adhere to environmental
management systems, environmental management plans
and environmental improvement plans;
- (4) arrange for audits as to whether or not the
implementation conditions have been complied with to
be carried out at specified times by a person nominated
or approved by the CEO and report to the CEO on the
findings of those audits.
- (5C) In subsection (5B) —
specified means specified in an implementation condition;
subject land means the land to which the assessed proposal
relates.
- (5) Despite anything in this section —
- (a) an implementation issue cannot be agreed or decided
under this section during the period of 21 days referred
to in section 100(3a)(b); and
- (b) if an appeal is lodged under section 100(1)(d) in respect
of the report —
- (i) an implementation issue cannot be agreed or
decided under this section while the appeal is
pending; and
- (ii) the outcome of the appeal must be considered
when functions are being performed under
subsection (1C), (1D), (2) or (3).
- (c) if an appeal is lodged under section 100(3) in respect of
the implementation agreement or decision —
- (i) the assessed proposal cannot be implemented
while the appeal is pending; or

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Number: 1 Author: CME WA Subject: Highlight Date: 15/01/2020
2:47:34 PM

What happens if the proponent does not have access / authority to the land? Conditions imposed must not be impossible.

Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020
2:10:24 PM

Change '(h)' to '(e)'

Number: 3 Author: CME WA Subject: Highlight Date: 17/01/2020
10:52:18 AM

The presence / absence of a management 'system' is process focussed not environmental outcome focussed. It can also be difficult to audit. The focus of conditions should be environmental outcomes.

Recommend remove 'environmental management systems'.

Number: 4 Author: CME WA Subject: Highlight Date: 13/01/2020
2:09:52 PM

Change '(e)' to '(f)'

Number: 5 Author: CME WA Subject: Highlight Date: 25/01/2020
1:59:56 PM

It is CME's understanding that this section has been redrafted as a response to the Yeelirrie court case (WASC34) (see page 13 of the Discussion Paper). Given the court case decision confirmed what was the Minister's decision on the appeal and that the appeal decision does not

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- (c) give an environmental undertaking in relation to land other than the subject land; or
 - (d) arrange for an environmental protection covenant to be given by a specified person other than the proponent in relation to land other than the subject land;
 - (h) prepare, implement and adhere to environmental management systems, environmental management plans and environmental improvement plans;
 - (e) arrange for audits as to whether or not the implementation conditions have been complied with to be carried out at specified times by a person nominated or approved by the CEO and report to the CEO on the findings of those audits.
- (5C) In subsection (5B) —
- specified* means specified in an implementation condition;
- subject land* means the land to which the assessed proposal relates.
- (6) Despite anything in this section —
- (a) an implementation issue cannot be agreed or decided under this section during the period of 21 days referred to in section 100(3a)(b); and
 - (b) if an appeal is lodged under section 100(1)(d) in respect of the report —
 - (i) an implementation issue cannot be agreed or decided under this section while the appeal is pending; and
 - (ii) the outcome of the appeal must be considered when functions are being performed under subsection (1C), (1D), (2) or (3).
 - (c) if an appeal is lodged under section 100(3) in respect of the implementation agreement or decision —
 - (i) the assessed proposal cannot be implemented while the appeal is pending; or

constrain the outcome of the decision-making process (i.e. the court decision confirmed the State's interpretation and application of the Act was legally robust) it is unclear why this must be re-worded / re-written as it has now been tested and confirmed by the WASC. Redrafting changes the wording and hence means new wording will not have been through the WA Supreme Court so may be challenged afresh.

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Division 2 Implementation of proposals

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(ii) the implementation of the assessed proposal cannot be subjected to any condition or procedure that is not in accordance with the decision made on the appeal.

~~(6) Notwithstanding anything in this section, if an appeal is lodged under —~~

~~(a) section 100(1)(d) in respect of a report published under section 44(3), the proposal to which that report relates shall not be implemented and conditions and procedures shall not be agreed or decided under this section —~~

~~(i) while the appeal is pending; or~~

~~(ii) otherwise than in accordance with the decision made on the appeal;~~

~~or~~

~~(b) section 100(3) in respect of any conditions or procedures agreed or decided under this section, the proposal shall not be implemented —~~

~~(i) while the appeal is pending; or~~

~~(ii) subject to any conditions or procedures which are not in accordance with the decision made on the appeal.~~

~~(7) The Minister may, as soon as he is satisfied that there is no reason why a proposal in respect of which a statement has been published under subsection (5)(b) should not be implemented, cause to be served on the decision-making authority precluded by section 41 from making any decision that could have the effect of causing or allowing that proposal to be implemented an authority in writing permitting such a decision to be made.~~

(6A) Subsection (7) applies if —

(a) a statement has been published under subsection (5)(b) in respect of the assessed proposal

(b) the Minister is satisfied that there is no reason why the assessed proposal should not be implemented.

(7) As soon as this subsection applies, the Minister ¹ay cause to be served on the decision-making authority precluded by section 41 from making a DMA decision an authority in writing permitting a DMA decision to be made.

(8) If the implementation agreement or decision is that the assessed proposal may not be implemented, the Minister ~~shall~~must forthwith notify the persons referred to in subsection (5)(a)(i), (ii), (iii) and (iv) in writing accordingly.

(9) ²n implementation agreement or decision that a significant amendment of an approved proposal may not be implemented does not affect the implementation of the approved proposal.

[Section 45 amended: No. 54 of 2003 s. 16.]

³A. Implementation of derived proposal

(1) In this section —


section 39B declaration means a declaration under section 39B that a proposal is a derived proposal.

(2) Subject to subsection (3), when the Minister is notified under section 39B(5)(b) of a section 39B declaration, the implementation agreement or decision previously made in relation to the derived proposal takes effect and the Minister is to cause written notice of the taking effect of the agreement or decision to be served on —


- (a) the Authority; and
- (b) each decision-making authority that was notified of the agreement or decision under section 45(5)(a)(ii); and
- (c) the proponent of the derived proposal; and
- (d) the person who referred the derived proposal (if it was not referred by a person referred to in paragraph (b) or (c)).

(3) If the implementation agreement or decision previously made in relation to the derived proposal included implementation conditions relating generally to 2 or more future proposals, the


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 Number: 1 Author: CME WA Subject: Highlight Date: 27/01/2020 9:29:16 AM

Change 'may' to 'must'. Given the significance of this prohibition on the activities of others, it should be a will rather than a discretionary option.

 Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020 3:06:20 PM

Support.

 Number: 3 Author: CME WA Subject: Highlight Date: 25/01/2020 2:01:03 PM

Recommend the addition of express powers that s45C and s46 to s46C apply to the notice issued under s45A(2), not just the strategic proposal ministerial statement issued under s45 (i.e. s45C to apply to changes to the description of the derived proposal and s46 to s46C to apply to implementation conditions referred to in the s45A(2) notice).

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s. 45B

Minister may, in the notice under subsection (2), specify which of those implementation conditions apply to the derived proposal and, subject to sections 46 to 46C, the conditions and procedures so specified are the implementation conditions relating to the derived proposal.

[Section 45A inserted: No. 54 of 2003 s. 17; amended: No. 40 of 2010 s. 4.]

45B. Implementation conditions apply to ~~revised~~ approved proposals revised by significant amendments

If a significant amendment of an approved proposal is referred to the Authority under section 38, ~~a proposal is revised after implementation conditions have been agreed or decided~~, each of ~~those the~~ implementation conditions relating to the approved proposal continues to apply in relation to the approved ~~revised~~ proposal subject to —

- (a) it being changed under section 46 or 46C; or
- (b) revised conditions or procedures being agreed or decided under section 45 in relation to the ~~revised~~ approved proposal after the ~~revised proposal significant amendment~~ has been ~~referred to the Authority and~~ assessed in accordance with section 40(1A).

[Section 45B inserted: No. 54 of 2003 s. 17.]

1C. ~~Changes to~~ 2 amendment of 3 approved proposals after s. 45(5) statement issued

- (1) Subject to subsection (2), ~~After a statement has been issued under section 45(5) in relation to a proposal~~, the Minister may approve of the proponent ~~changing the~~ amending an approved proposal ~~without a revised proposal being referred to the Authority under this Part~~.

(1A) 4 The Minister may, by written notice, request the proponent to provide the Minister with additional information about the amendment to the approved proposal to enable the Minister to decide whether to give approval under subsection (1).

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Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020 2:09:25 PM

How provisions apply to strategic proposals and derived proposals needs to be expressly stated.

Number: 2 Author: CME WA Subject: Highlight Date: 25/01/2020 2:05:38 PM

It is unclear whether this section applies to significant amendments. If so, this needs to be expressly stated. In general, the (assumed) intent of the proposed amendments as described through the Discussion Paper is supported but the drafting in this section is not clear and hence it is unclear if the drafting achieves the aim.

Number: 3 Author: CME WA Subject: Highlight Date: 25/01/2020 2:05:52 PM

Recommend an express power (or acknowledgement) added that allows for the merger / combining of proposals (to result in a single authorisation), a splitting of proposals (to result in two or more authorisations, potentially with different proponents) and a superseding / replacement of proposals (that definitively terminates the previous authorisation). This should extend to enabling these actions in respect of derived proposals, including combining a stand-alone approved proposal with a related derived proposal (for example, for expansion of the project the subject of the stand-alone approval).

Number: 4 Author: CME WA Subject: Highlight Date: 25/01/2020 2:06:22 PM

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Division 2 Implementation of proposals

s. 45B

Minister may, in the notice under subsection (2), specify which of those implementation conditions apply to the derived proposal and, subject to sections 46 to 46C, the conditions and procedures so specified are the implementation conditions relating to the derived proposal.

[Section 45A inserted: No. 54 of 2003 s. 17; amended: No. 40 of 2010 s. 4.]

45B. Implementation conditions apply to ~~revised~~ approved proposals revised by significant amendments

If a significant amendment of an approved proposal is referred to the Authority under section 38, ~~a proposal is revised after implementation conditions have been agreed or decided~~, each of ~~those the~~ implementation conditions relating to the approved proposal continues to apply in relation to the approved ~~revised~~ proposal subject to —

- (a) it being changed under section 46 or 46C; or
- (b) revised conditions or procedures being agreed or decided under section 45 in relation to the ~~revised~~ approved proposal after the ~~revised proposal significant amendment~~ has been ~~referred to the Authority and~~ assessed in accordance with section 40(1A).

[Section 45B inserted: No. 54 of 2003 s. 17.]

45C. ~~Changes to~~ Amendment of approved proposals after s. 45(5) statement issued

- (1) Subject to subsection (2), ~~After a statement has been issued under section 45(5) in relation to a proposal~~, the Minister may approve of the proponent ~~changing the~~ amending an approved proposal ~~without a revised proposal being referred to the Authority under this Part~~.

(1A) The Minister may, by written notice, request the proponent to provide the Minister with additional information about the amendment to the approved proposal to enable the Minister to decide whether to give approval under subsection (1).

This approach needs statutory timeframes and procedures as s45C applications are taking increasingly longer to be assessed. For example, a timeframe for the EPA to decide whether to consider an application under s45C, and timeframes for requests for additional information. How does this section relate (or not) to an amendment that is not significant? Or if an amendment is determined not to be significant (and therefore does not need approval under s45C)?

- (2) **1** The Minister must not give approval under subsection (1) if the Minister considers the ~~change or changes~~ amendment to the approved proposal might have a significant detrimental effect on the environment in addition to, or different from, the effect of the ~~original~~ proposal as originally approved.

[Section 45C inserted: No. 54 of 2003 s. 17.]

46. Changing implementation conditions

- (1) If the Minister considers that the implementation conditions relating to an approved proposal, or any of them, should be changed (whether because of ~~changes~~ an amendment to the proposal authorised under section 45C or for any other reason), the Minister may request the Authority to inquire into and report on the matter within such period as is specified in the request.
- (2) The Authority is to record any request made under subsection (1) in the public record kept under section 39.
- (3) The Authority is to carry out an inquiry in accordance with a request made under subsection (1).
- (4) Without limiting subsection (1), if a proposal is declared under section 39B to be a derived proposal, the Authority may inquire into whether or not the implementation conditions relating to the proposal, or any of them, should be changed.
- (5) For the purposes of an inquiry under subsection (3) or (4) the Authority has all the powers conferred on it by Division 1 in relation to a proposal.
- (6) On completing an inquiry under subsection (3) or (4), the Authority is to prepare and give to the Minister a report that includes —
- (a) a recommendation on whether or not the implementation conditions to which the inquiry relates, or any of them, should be changed; and
 - (b) any other recommendations that it thinks appropriate.

Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020 2:06:38 PM

Support the alignment of the test for amendment of conditions with the test currently used in section 45C.

Where a revised proposal has been approved following multiple section 45C amendments to the original, and is consequently substantially different from the original proposal, future amendments to the approval revised proposal which might have a significant detrimental effect on the environment should be reviewed against the approved revised proposal, not the original proposal. This can be achieved by requiring the review of section 45C applications against the Ministerial Statement, rather than the 'proposal as originally approved'.

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- (7) As soon as the Minister is reasonably able to do so after receiving copies of a report under subsection (6), the Minister is to simultaneously cause that report to be published, and copies of that report to be given, as if that report were a report referred to in section 44(3).
- (8) After causing a report to be published under subsection (7), the Minister is to deal with the question of whether or not the implementation conditions to which the report relates, or any of them, should be changed as if that question were the question of to what conditions and procedures, if any, the implementation of a proposal should be subjected, and section 45 applies to the first-mentioned question accordingly.

(8A) Despite subsection (8) the Minister's obligations under section 45(1C) and (1D) as applied by subsection (8) do not extend to a ¹decision-making authority unless the Minister considers that the report under subsection (6) recommends a change to an implementation condition that would, if made, affect the decision-making functions of that decision-making authority.

- (9) A statement under section 45(5) as applied by subsection (8) may change any of the implementation conditions to which the report under subsection (6) relates.
- (10) A reference in this Division to a statement under section 45(5) includes a reference to a statement under section 45(5) as applied by subsection (8).

[Section 46 inserted: No. 54 of 2003 s. 18.]

46A. Interim conditions and procedures

- (1) Having made a request under section 46(1) the Minister may, subject to subsection (3) and with the consent of the proponent, issue interim conditions and procedures to have effect instead of the implementation conditions until a statement is published under section 45(5)(b) as applied by section 46(8).

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📄 Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020
2:07:11 PM

Depending on decision regarding drafting of 'DMA' vs 'key DMA', may need to consider all areas within the EP Act where DMA / key DMAs are referred to.

- (2) The Minister is to cause notice of interim conditions and procedures issued under subsection (1) —
- (a) to be given in writing to —
 - (i) the Authority; and
 - (ii) each decision-making authority that was notified of the original implementation agreement or decision under section 45(5)(a)(ii); and
 - (iii) the proponent of the proposal;
 - and
 - (b) to be published in a prescribed manner.
- (3) The Minister is not to issue interim conditions and procedures under subsection (1) if the Minister considers that implementation of the proposal under those interim conditions and procedures might have a significant detrimental effect on the environment in addition to, or different from, the effect the proposal might have if implemented under the implementation conditions.


[Section 46A inserted: No. 54 of 2003 s. 18.]

46B. Amendment of implementation conditions by assessment


- (1) Section 46 does not prevent any of the implementation conditions relating to an approved proposal from being inquired into or reported on by the Authority when it is assessing a ~~revised or further~~ significant amendment of the proposal in accordance with section 40(1A).
- (2) Despite anything in section 46, if the Minister and any decision-making authority that was consulted under this Act in relation to the implementation conditions agree that a proposed change to the implementation conditions is major change, that decision-making authority is to refer the proposed change to the Authority under section 38(5) as a new proposal.

[Section 46B inserted: No. 54 of 2003 s. 18.]

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 Number: 1 Author: CME WA Subject: Highlight Date: 16/01/2020 11:42:02 AM

Recommend change "change" to "amendment".

 Number: 2 Author: CME WA Subject: Highlight Date: 15/01/2020 4:23:01 PM

This language appears to be a legacy from previous revisions of the EP Act where amendments were categorised as major or minor. For consistency with new terminology and references to significant amendments, suggest rewording to:

"[...] proposed change to the implementation conditions is a significant amendment, that decision-making authority [...]"

46C. ~~Minor~~ Changes to implementation conditions without inquiry or assessment

- (1) The Minister may change the implementation conditions relating to an approved proposal without making a request under section 46(1) if the Minister considers that the change is of a minor nature and is necessary or desirable in order to —
- (a) standardise the implementation conditions applying to different proposals; or
 - (b) correct in the implementation conditions —
 - (i) a clerical mistake or unintentional error or omission; or
 - (ii) a figure that has been miscalculated; or
 - (iii) a misdescription of any person, thing or property;
 - or
 - (c) make an administrative change to the format of the implementation conditions that does not alter the obligations of the proponent.

(1A) Without limiting subsection (1), the Minister may change the implementation conditions relating to an approved proposal without making a request under section 46(1) if —

- (a) the proponent of the proposal requests the Minister, in writing, to do so; and
- (b) the Minister considers that implementation of the proposal under the changed implementation conditions will not have a significant detrimental effect on the environment in addition to, or different from, the effect the proposal has in its implementation under the existing implementation conditions.

- (2) The Minister is to cause notice of changes made under subsection (1) or (1A) —
- (a) to be given in writing to —
 - (i) the Authority; and

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 Number: 1 Author: CME WA Subject: Highlight Date: 14/01/2020 8:24:22 AM

Support. This amendment removes a compulsory assessment process for a change to conditions irrespective of whether they have environmental implications. The inclusion of a similar test as for s45C regarding whether there are additional or different significant adverse environmental impacts is a practical and well understood test for changes to conditions.

- (ii) each decision-making authority that was consulted under this Act in relation to the implementation conditions; and
 - (iii) the proponent of the proposal;
- and

(b) to be published in a prescribed manner.

[Section 46C inserted: No. 54 of 2003 s. 18.]

47. Duties of proponents after service of s. 45 statement

- (1) If a statement has been served under section 45(5)(a) and the proponent does not ensure that any implementation of the proposal to which the statement relates is carried out in accordance with the implementation conditions, the proponent commits an offence.

(2) If a statement has been served under section 45(5)(a), the CEO may by written notice given to the proponent —

- (a) require the proponent to give the CEO reports and information about the implementation of the proposal to which the statement relates; and
- (b) require the proponent to undertake tests, surveys, investigations, monitoring or other work and give the CEO reports and information about the tests, surveys, investigations, monitoring or work,

in order to enable the CEO to assess compliance with the implementation conditions.

~~(2) If a statement has been served under section 45(5)(a), the proponent is to give the CEO such reports and information about —~~

~~(a) the implementation of the proposal to which the statement relates; and~~

~~(b) compliance with the implementation conditions,~~

~~as are required by written notice given to the proponent by the CEO.~~

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- (3) If, without reasonable excuse, the proponent refuses or fails to comply with a requirement made under subsection (2), the proponent commits an offence.
- (4) If a notification has been given under section 45(8) and the proponent does anything to implement the proposal to which the notification relates, the proponent commits an offence.

[Section 47 inserted: No. 54 of 2003 s. 19.]

1 A. Duration and revocation of implementation agreement or decision

- (1) **2** the implementation agreement or decision relating to an approved proposal continues to have effect unless it is revoked or taken to have been revoked under this section.

- (2) This subsection applies if —

- (a) the implementation agreement or decision relating to an approved proposal contains a condition mentioned in section 45(5B)(a) (the *commencement condition*); and
- (b) the CEO gives the Minister written notice that, in the CEO's opinion, the commencement condition has not been complied with.

- (3) This subsection applies if the proponent of an approved proposal requests the Minister, in writing, to revoke the implementation agreement or decision relating to the proposal and the Minister is satisfied —

- (a) that the proposal has been implemented and that the implementation conditions, if any, have been complied with or no longer need to be complied with; or
- (b) that the impacts of the implementation of the proposal can be satisfactorily mitigated by way of licensing or some other form of regulatory control under this Act or another written law.

- (4) If subsection (2) or (3) applies, the Minister may revoke the implementation agreement or decision if the Minister considers that it is appropriate to so.

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Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020
2:08:50 PM

Support the general intent of this proposed amendment noting some queries / clarification required.

Strongly recommend inclusion of express powers to supersede, combine and/or split Ministerial Statements, applicable also to proposals that have more than one Ministerial Statement as a result of s46 changes, derived proposals, and the combination of derived proposals with existing approved proposals.

The application to derived proposals needs to be clarified. Would this apply to Derived Proposals that have been issued a s45A notice (i.e. do the powers to revoke a Ministerial Statement apply to s45A notices)?

Conditions of Strategic Proposal Ministerial Statements, for example, condition 3-1 of MS1105 imposes a time limit for substantial commencement of the derived proposal from issue of the s45A Notice.

This does satisfy the test of being "condition mentioned in section 45(5B)(a)", so the revocation power is applicable. Section 47A(4) provides that the Minister may revoke "the implementation agreement or decision". It should be clarified that the revocation is limited to the derived proposal and does not extend to the entire strategic proposal approval.

Number: 2 Author: CME WA Subject: Highlight Date: 25/01/2020
2:09:06 PM

Clarification is required as to how this section does or does not relate /

Comments from page 102 continued
on next page

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- (3) If, without reasonable excuse, the proponent refuses or fails to comply with a requirement made under subsection (2), the proponent commits an offence.
- (4) If a notification has been given under section 45(8) and the proponent does anything to implement the proposal to which the notification relates, the proponent commits an offence.

[Section 47 inserted: No. 54 of 2003 s. 19.]

47A. Duration and revocation of implementation agreement or decision

(1) The implementation agreement or decision relating to an approved proposal continues to have effect unless it is revoked or taken to have been revoked under this section.

(2) This subsection applies if —

(a) the implementation agreement or decision relating to an approved proposal contains a condition mentioned in section 45(5B)(a) (the *commencement condition*); and

(b) ³ the CEO gives the Minister written notice that, in the CEO's opinion, the commencement condition has not been complied with.

(3) This subsection applies if the proponent of an approved proposal requests the Minister, in writing, to revoke the implementation agreement or decision relating to the proposal and the Minister is satisfied —

(a) that the proposal has been implemented and that the implementation conditions, if any, have been complied with or no longer need to be complied with; or

(b) that the impacts of the implementation of the proposal can be satisfactorily mitigated by way of licensing or some other form of regulatory control under this Act or another written law.

(4) If subsection (2) or (3) applies, the Minister may revoke the implementation agreement or decision if the Minister considers that it is appropriate to so.

address existing proposals that have passed the period of their substantial commencement (but, for example, may have applied to have it amended / extended but have not yet received this confirmation).

📄 Number: 3 Author: CME WA Subject: Highlight Date: 25/01/2020 2:09:38 PM

Recommend an additional clause to require the CEO to reach agreement with the proponent on the revocation of a Ministerial Statement. CME do not support the Minister's unilateral ability to terminate a Ministerial Statement without the proponent's consent (merely on the basis of the CEO determining that the commencement condition hasn't been met). This is illogical, and unreasonable, and is not consistent with the other termination provisions in the section. It is illogical as the project can't commence in any case until the Minister agrees to amend the Statement. It is unreasonable as it provides the proponent no say in whether it wishes to maintain the approval (unlike proposed s47A(3)).

For example, if a proponent has no intention of ever implementing the approved proposal and there is no value in maintaining the approval for the future sale of the project to a third party (with the risk of whether a s46 amendment can be obtained for a new commencement period – which may require new surveys and comprehensive re-assessment), then presumably the proponent will consent to termination.


The current s47A proposal is not demonstrably representative of "good" regulatory process or governance in the absence of a strong environmental protection or public resourcing justification (i.e. balancing scarce public resources), of which there appears to be none.

- (5) If under subsection (4) the Minister revokes the implementation agreement or decision relating to an approved proposal, the Minister is to cause notice of the revocation —
- (a) ¹ be served on —
- (i) the Authority and the CEO; and
- (ii) each decision-making authority that was notified of the agreement or decision under section 45(5)(a)(ii); and
- (iii) the proponent of the proposal²
- (iv) the person who referred the proposal (if it was not referred by a person referred to in subparagraph (ii) or (iii))³
- and
- (b) to be published in a prescribed manner as soon as is practicable after it is served under paragraph (a).
- (6) If the implementation agreement or decision relating to an approved proposal specifies that it has effect for a specified period, it is taken to have been revoked when that period ends.
- (7) If an implementation agreement or decision is revoked or taken to have been revoked under this section, any statement published in relation to the assessed proposal under section 45(5)(b), or under section 45(5)(b) as applied by section 46(8), has no further effect.

48. Control of implementation of proposals


- (1) The CEO may monitor the implementation of a proposal, or cause it to be monitored, for the purpose of determining whether the implementation conditions relating to the proposal are being complied with.

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 Number: 1 Author: CME WA Subject: Highlight Date: 15/01/2020
4:42:36 PM

As 'to serve' requires receipt of the item it would not be possible to comply in circumstances where the proponent of the proposal or the person that referred the proposal is a natural person that is a deceased person or if a non-natural person, the entity non-longer exists. This would prevent Govt from clearing out their historic backlog of unused and unable proposals.

Recommend reword to "to be served on, where reasonably practicable[...]".

 Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020
2:07:34 PM

Change to "the proponent of the proposal; and"

 Number: 3 Author: CME WA Subject: Highlight Date: 13/01/2020
2:06:11 PM

Change full stop to semicolon (;).

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- (1a) If the CEO finds that any of the implementation conditions is not being complied with, the CEO —
- (a) may exercise any power in respect of the non-compliance that is exercisable by the CEO under a written law; and
 - (b) in any event, is to report the non-compliance to the Minister.

(2) If implementation conditions relating to an approved proposal subject the implementation of the proposal to requirements made by —

(a) a decision-making authority; or

(b) another public authority with functions or expertise relevant to the proposal,

the decision-making authority or public authority may monitor that implementation, or cause it to be monitored, for the purpose of determining whether the implementation conditions of that kind are being complied with.

~~—(2) If implementation conditions relating to a proposal subject the implementation of the proposal to requirements made by a decision-making authority, the decision-making authority may monitor that implementation, or cause it to be monitored, for the purpose of determining whether the implementation conditions of that kind are being complied with.~~

(2a) If the decision-making authority or public authority finds ~~authority finds~~ that any of the implementation conditions of that kind is not being complied with, it — ~~the decision-making authority —~~

- (a) may exercise any power in respect of the non-compliance that is exercisable by it under a written law or otherwise; and
- (b) in any event, is to report the non-compliance to the Minister.

(3) The Minister shall in relation to a proposal —

[(a) deleted]

(b) on receiving any relevant report made to **1**m under subsection (1a)(b) or (2a)(b); or

(c) if he is not satisfied with any relevant monitoring conducted, any relevant exercise of power, or any relevant report made or omitted to be made, under this section,

exercise one or more of the powers set out in subsection (4).

(4) The powers ~~which the Minister shall exercise~~ under subsection (3) are ~~that he may~~ as follows —

(a) after making reasonable endeavours to consult the proponent of the relevant proposal, power to cause to be served on that proponent a written notice issued by the Minister requiring that proponent —

(i) forthwith to stop the implementation of that proposal; and


(ii) not to resume the implementation of that proposal during a period specified in that notice being a period ending not more than 28 days after the day on which that notice is served;

and

~~(a) after making reasonable endeavours to consult the proponent of the relevant proposal, cause to be served on that proponent an order made by the Minister and requiring that proponent forthwith to stop the implementation of that proposal for a period not exceeding 24 hours; and~~

(b) power to cause to be served on the proponent of the relevant proposal a written notice issued by the Minister requiring that proponent to take such steps as are specified in that notice ~~an order made by the Minister and requiring that proponent to take such steps as are specified in that order~~ within such period as is so

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 Number: 1 Author: CME WA Subject: Highlight Date: 17/01/2020
9:41:31 AM

Change 'him' to 'him / her' or 'them'

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specified for the purpose of complying with the relevant condition or procedure or of preventing, controlling or abating any pollution or environmental harm caused by any non-compliance with that condition or procedure;

~~and~~

- (c) power to cause such steps as are necessary for the purpose of complying with the relevant condition or procedure to be taken; ~~and~~
- (d) power to cause such steps as are necessary for the purpose of preventing, controlling or abating any pollution or environmental harm caused by any non-compliance with the relevant condition or procedure to be taken; ~~and~~
- (e) if he considers that the relevant condition or procedure should be changed, power to make a request under section 46(1).

1 **2** Subject to section 101(4), the cost of taking any steps referred to in subsection (4)(c) or (d) is a debt due to the Crown by the proponent concerned and may be recovered from him by the Minister by action in a court of competent jurisdiction and shall, if so recovered, be credited to the Consolidated Account.

- (6) A proponent who does not comply with a notice served on the proponent ~~an order served on him~~ under subsection (4)(a) or (b) commits an offence.

(7) Subsection (6) does not apply to the resumption of the implementation of a proposal before the end of the period specified in a notice under subsection (4)(a)(ii) if the Minister has served a written notice on the proponent authorising implementation to be resumed.

- (8) **3** is not necessary to publish in the *Gazette* a notice served under subsection (4)(a) or (b) or (7).

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Number: 1 Author: CME WA Subject: Highlight Date: 16/01/2020
11:52:48 AM

Change 'him' to 'him / her' or 'the proponent'

Number: 2 Author: CME WA Subject: Highlight Date: 17/01/2020
9:22:57 AM

Recommend update cost recovery mechanism.

Number: 3 Author: CME WA Subject: Highlight Date: 25/01/2020
2:10:35 PM

Clarity required where notices under s48(4)(a), 48(4)(b), or 48(7) will be published in order to ensure transparency. It is unclear from drafting what is intended for transparency for these notices.

~~(7) It shall not be necessary to publish in the *Gazette* an order served under subsection (4)(a) or (b).~~

[Section 48 amended: No. 6 of 1993 s. 11; No. 49 of 1996 s. 64; No. 54 of 2003 s. 20 and 34; No. 77 of 2006 s. 4.]

48AA. Fees and charges relating to referral and assessment of proposals

- (1) Without limiting section 123(1) and (2), regulations may be made under section 123(1) prescribing fees or charges that are payable by proponents in prescribed circumstances in relation to the referral, assessment and ¹plementation of proposals under Division 1 and this Division.
- (2) To the extent that regulations to which subsection (1) applies prescribe a fee or charge that includes an amount that is a tax, the regulations may impose the tax.
- (3) This section does not limit the *Interpretation Act 1984* section 45A.

[NOTE: Subsections (2) and (3) will need to be inserted by a separate Act to comply with constitutional requirements.]

²Division 3 — Assessment of schemes

[Heading inserted: No. 23 of 1996 s. 20.]

48A. Authority to decide whether or not schemes to be assessed

- (1) When a scheme is referred to the Authority under the relevant scheme Act, the Authority shall, if it considers that the scheme —
 - (a) should not be assessed by it under this Division, so inform in writing the responsible authority within 28 days after that referral, but may nevertheless give advice and make recommendations to the responsible authority and any other relevant person on the environmental issues raised by the scheme; or

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📄 Number: 1 Author: CME WA Subject: Highlight Date: 15/01/2020 5:26:26 PM

Unclear why 'implementation' has been added here.

CME was of the understanding that the State was considering a fee structure associated with referral services and environmental impact assessment services only.

Please clarify why 'implementation' has been added (also noting inconsistency with heading).

📄 Number: 2 Author: CME WA Subject: Highlight Date: 15/01/2020 5:27:57 PM

Please note CME has not reviewed the wording of this Division as CME members are predominantly proposals not schemes.

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s. 48A

- (b) should be assessed by it under this Division —
 - (i) so inform in writing the responsible authority and any relevant decision-making authority within 28 days after that referral and send within 60 days after that referral any instructions issued by the Authority under section 48C(1)(a) concerning the scope and content of an environmental review of the scheme; and
 - (ii) assess under this Division changes in reservation and zoning proposed by the scheme;or
 - (c) is by its nature incapable of being made environmentally acceptable, so inform in writing the responsible authority and the Minister within 28 days after that referral.
- (2) On being informed under subsection (1)(c), the Minister may —
- (a) under section 48E direct the Authority to assess the relevant scheme; or
 - (b) with the agreement of the responsible Minister, advise —
 - (i) the Authority; and
 - (ii) the responsible authority; and
 - (iii) any relevant decision-making authority,that the responsible authority cannot be informed under subsection (1)(a) and that a statement cannot be delivered and published under section 48F(2).
- (3) If the Minister and the responsible Minister cannot agree on whether or not advice should be given under subsection (2)(b), section 48J applies.

[Section 48A inserted: No. 23 of 1996 s. 20.]

48BA. Request for further information about a referred scheme

- (1) If the Authority considers that it does not have enough information about a scheme referred to it under the relevant scheme Act to enable it to decide —
- (a) whether or not to assess the scheme; or
- (b) whether or not the scheme is by its nature capable of being made environmentally acceptable,
- it may, by written notice, request any person to provide it with additional information about the scheme.
- (2) The 28 day periods set by section 48A(1)(a), (b) and (c) and the 60 day period set by section 48A(1)(b) are not to be regarded as having begun in relation to a scheme until each notice issued under subsection (1) in relation to the scheme has been complied with.

48B. Authority to keep public records of schemes referred to it

- (1) The Authority shall, subject to ~~this section~~ the publication regulations, keep a public record of each scheme referred to it under the relevant scheme Act and shall in that public record set out —
- (a) whether or not that scheme is to be assessed under this Division; and
- (b) if that scheme is to be assessed under this Division, any instructions issued by the Authority under section 48C(1)(a) concerning the scope and content of an environmental review of that scheme.

~~(2) The Authority shall cause each public record kept by it under subsection (1) to be made available for public inspection under such conditions and at such places and times as are prescribed.~~

[Section 48B inserted: No. 23 of 1996 s. 20.]

48C. Authority's powers for assessing referred schemes

- (1) The Authority may, for the purpose of assessing under this Division a scheme referred to it under the relevant scheme Act —
 - (a) require the responsible authority, if it wishes that scheme to proceed, to undertake an environmental review of that scheme and report on it to the Authority, and issue to the responsible authority instructions concerning the scope and content of that environmental review; and
 - (aa) require the responsible authority, if it wishes that scheme to proceed, to provide to the Authority a contaminated sites auditor's report on that scheme, which complies with any relevant regulations made under the *Contaminated Sites Act 2003*; and
 - (b) require any person to provide it with such information as is specified in that requirement; and
 - (c) make such investigations and inquiries as it thinks fit; and
 - (d) consider existing reservations and zonings if the Authority is of the opinion that there is scientific or technical information that a proposal framed in accordance with one or more of those reservations or zonings is likely, if implemented, to have a significant effect on the environment.
- (2) A responsible authority or person of which or whom a requirement is made under subsection (1) shall comply with that requirement.
- (3) Subject to any direction given under section 48E, the Authority shall determine the form, timing and procedure of any environmental review required to be undertaken under subsection (1)(a).

(3A4) Subject to the publication regulations, the Authority may cause to be published in a prescribed manner —

- (a) any report made in compliance with a requirement made under subsection (1)(a) or (aa); or
- (b) any information provided in compliance with a requirement made under subsection (1)(b).

~~to be made available for public review and shall, if it does so, determine the period within which, the extent to which and the manner in which public authorities or persons may make submissions to the Authority in respect of that report or information.~~

(4) When publishing a report or information under subsection (3A) the Authority may —

- (a) declare the report or information to be available for public review; and
- (b) specify the period within which, the extent to which and the manner in which public authorities or persons may make submissions to the Authority in respect of the report or information.

(5) When any report or information is ~~made~~ declared to be available for public review under subsection (4) or made available for public review under the relevant scheme Act —

- (a) the responsible authority ~~shall~~ must, subject to the publication regulations —
 - (i) at its own expense, publish notice in a prescribed manner that ~~advertise the availability of~~ the report or information is available for public review; and
 - (ii) subject to the publication regulations, provide copies of the report or information to such persons at such places and times and at such prices as are prescribed;

and

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- (b) the Authority may require the responsible authority to respond to any submissions made in respect of that report or information in such manner as the Authority thinks fit.
- (6) Despite subsections (3), (4) and (5), if a scheme Act provides for the timing and procedure of the public review of a scheme —
 - (a) the responsible authority shall incorporate in the report on the scheme any environmental review undertaken in compliance with a requirement made under subsection (1)(a); and
 - (b) the provisions of the scheme Act relating to that public review shall apply to the scheme with that environmental review incorporated in that report and subsections (3), (4) and (5) shall not so apply.
- (7) In subsection (6) —
 - public review**, in relation to a scheme which is —
 - [(a), (aa) deleted]*
 - (ab) prepared under the *Hope Valley-Wattleup Redevelopment Act 2000*, means the procedure referred to in sections 13 and 14 of that Act, or in section 17 of that Act as read with those sections; or
 - [(b) deleted]*
 - (c) a region planning scheme, or an amendment to a region planning scheme, means the procedure referred to in sections 43, 44, 46 and 48, or section 58, as the case requires, of the *Planning and Development Act 2005*; or
 - (d) a local planning scheme, or an amendment to a local planning scheme, means the procedure referred to in sections 84 and 87(1) of the *Planning and Development Act 2005*; or
 - (e) a State planning policy to which section 32 of the *Planning and Development Act 2005* applies, or an amendment to such a policy, means the procedure

referred to in sections 84 and 87(1), as read with section 32, of that Act; or

- (f) an improvement scheme, or an amendment to an improvement scheme, means the procedure referred to in the *Planning and Development Act 2005* sections 84 and 87(1) as read with section 122B(1) of that Act; or
- (g) prepared under the *Metropolitan Redevelopment Authority Act 2011*, means a procedure referred to in sections 43 and 44 of that Act, or in section 49 of that Act as read with those sections.

[Section 48C inserted: No. 23 of 1996 s. 20; amended: No. 38 of 1999 s. 71(3); No. 77 of 2000 s. 37(3); No. 25 of 2001 s. 69; No. 60 of 2003 s. 100; No. 38 of 2005 s. 15; No. 28 of 2010 s. 26; No. 45 of 2011 s. 137(7).]

48D. Authority to report to Minister on schemes

- (1) Subject to subsection (2), the Authority shall, within a period of —
 - (a) 60 days after the end of the period of public review under the relevant scheme Act of a scheme referred to the Authority under that scheme Act; or
 - (b) 30 days after receiving a response to environmental issues raised in submissions made within the period of public review under the relevant scheme Act, but not more than 72 days after the end of the period referred to in paragraph (a),

whichever is the later, or such longer period as the Minister allows, report to the Minister on —

- (c) the environmental factors relevant to that scheme; and
- (d) the Authority's recommendations as to whether or not that scheme may be implemented and, if it recommends that the scheme be implemented, as to the conditions, if any, to which that scheme should be subject.

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~~(d) the conditions, if any, to which that scheme should be subject,~~
~~and may make such recommendations in that report as it sees fit.~~

(2) The Minister may, after consulting the Authority in respect of a scheme and with the agreement of the responsible Minister, direct the Authority to report to the Minister on the matters referred to in subsection (1)(c) and (d) in relation to the scheme, and to make such recommendations in that report as the Authority thinks fit —

- (a) within such period commencing on the day on which the scheme was referred to the Authority under the relevant scheme Act or a direction was given to the Authority under section 48E(1), as the case requires; or
- (b) before such date,


as the Minister specifies in that direction, and the Authority shall comply with that direction.

(3) The Minister shall, as soon as he is reasonably able to do so after receiving a report and any recommendations made to ^{1m} under subsection (1) or in compliance with a direction given under subsection (2), simultaneously cause —

- (a) that report and any such recommendations to be published in a prescribed manner; and
- (b) copies of that report and any such recommendations to be given to —
 - (i) the responsible Minister; and
 - (ii) any other Minister appearing to the Minister to be likely to be concerned in the outcome of the scheme to which that report relates; and
 - (iii) the responsible authority in respect of the scheme to which that report relates and any relevant decision-making authority.

[Section 48D inserted: No. 23 of 1996 s. 20.]

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Change 'him' to 'him / her' or 'them'

48E. Minister may direct Authority to assess etc. referred schemes

- (1) Having consulted the Authority and obtained the agreement of the responsible Minister, the Minister may —
- (a) if the Authority decides not to assess a scheme referred to it under the relevant scheme Act, after that decision but before the period of public review of that scheme begins; or
 - (b) if the Authority decides to assess a scheme referred to it under the relevant scheme Act, after that assessment has begun but before that scheme is finally approved,
- direct the Authority to assess that scheme under this Division, or to reassess that scheme under this Division more fully or more publicly or both, as the case requires, in accordance with that direction, and the Authority shall comply with that direction.
- (2) Sections 48A, 48B, 48C and 48D apply to the assessment or reassessment under this Division of a scheme under a direction given under subsection (1) as if that direction were a referral of the scheme under the relevant scheme Act.

[Section 48E inserted: No. 23 of 1996 s. 20.]

48F. Procedure for agreeing or deciding on conditions to which schemes are to be subject

- (1) The Minister must, after causing a report (the *report*) to be published under section 48D(3), consult the responsible Minister and, if possible, agree with that Minister on whether or not the scheme to which the report relates (the *scheme*) may be implemented and, if the scheme may be implemented, as to what conditions, if any, that implementation should be subject.

~~—(1) The Minister shall, after he has caused a report to be published under section 48D(3), consult the responsible Minister and, if possible, agree with him on the conditions, if any, to which the scheme to which the report relates should be subject if that scheme is to be implemented.~~

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(2) If an agreement is ~~reached~~ made under this section, or a decision is made under section 48J, that the scheme may be implemented and as to the conditions, if any, to which the scheme should be subject, the Minister must ~~on the conditions, if any, to which a scheme should be subject, the Minister shall cause~~ —

- (a) cause copies of a statement which sets out those conditions, if any, and advises that there is no environmental reason why the scheme should not be implemented subject to those conditions to be delivered to —
- (i) the Authority; and
 - (ii) the responsible Minister; and
 - (iii) any other Minister to whom a copy of the ~~relevant~~ report has been given under section 48D(3), the responsible authority and any relevant decision-making authority;

and

- (b) cause that statement to be published in a prescribed manner as soon after the delivery referred to in paragraph (a) as is practicable.

(3) Despite anything in this section or section 48J —

- (a) an agreement or decision on any of the matters referred to in subsection (1) relating to the scheme cannot be made under this section or section 48J during the period of 21 days referred to in section 100(3a)(c); and
- (b) if an appeal is lodged under section 100(1)(e) in respect of the report, an agreement or decision on any of the matters referred to in subsection (1) relating to the scheme cannot be made under this section or section 48J except for the purposes of section 101(2d)(a).

- ~~— (3) Despite anything in this section, a scheme to which a report published under section 48D(3) relates shall not be implemented, and conditions shall not be agreed under this section or decided under section 48J —~~
- ~~— (a) during the period of 14 days referred to in section 100(3a)(c); or~~
- ~~— (b) if an appeal is lodged under section 100(1)(c) in respect of that report —~~
- ~~— (i) while the appeal is pending; or~~
- ~~— (ii) otherwise than in accordance with the decision made on the appeal.~~

[Section 48F inserted: No. 23 of 1996 s. 20; amended: No. 54 of 2003 s. 21; No. 40 of 2010 s. 5.]

48G. Review of conditions in statements published under s. 48F

- (1) A responsible authority may, after the publication of a statement of conditions under section 48F(2)(b) and before the responsible Minister or the Governor grants final approval of the scheme to which that statement relates, request the responsible Minister to initiate a review of the conditions set out in the statement.
- (2) If the responsible Minister agrees to a request under subsection (1), the responsible Minister and the Minister shall consult each other and attempt to reach agreement on whether or not the relevant conditions should be altered and, if so, to what extent.
- (3) If conditions the subject of an agreement under this section or a decision under section 48J are altered by that agreement or decision, the Minister ~~shall cause~~ must —
- (a) cause copies of a statement setting out those conditions as altered to be delivered to —
- (i) the Authority; and
- (ii) the responsible Minister; and

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- (iii) the responsible authority and any relevant decision-making authority;

and

- (b) cause that statement to be published in a prescribed manner as soon after the service referred to in paragraph (a) as is practicable,

and conditions so altered shall be treated for the purposes of this Act as having been agreed under section 48F or decided under section 48J.

[Section 48G inserted: No. 23 of 1996 s. 20.]


Division 4 — Implementation of schemes

[Heading inserted: No. 23 of 1996 s. 20.]

48H. Control of implementation of assessed schemes

- (1) A responsible authority shall monitor or cause to be monitored the implementation of its assessed schemes and of proposals under its assessed schemes insofar as those assessed schemes and proposals are subject to any condition agreed under section 48F or decided under section 48J (referred to in this section as the **condition**) for the purpose of determining whether or not the condition has been or is being complied with.
- (2) If the responsible authority finds under subsection (1) that the condition has not been or is not being complied with, it shall —
 - (a) exercise such powers, if any, in respect of that non-compliance as are conferred on it by any written law as it thinks fit for the purpose of securing compliance with the condition; and
 - (b) report that non-compliance to the responsible Minister.
- (3) If non-compliance with the condition is reported to the responsible Minister under subsection (2)(b) or otherwise becomes known to **1**ⁿ, the responsible Minister shall —
 - (a) advise the Minister of that non-compliance; and

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Change 'him' to 'him / her' or 'them'

- (b) cause such steps to be taken as are necessary to achieve compliance with the condition.
- (4) If the Minister is not satisfied with any monitoring conducted, exercise of powers, report or advice made or received, or steps taken, under this section, the Minister may, after making reasonable endeavours to consult the responsible Minister, give the responsible Minister advice recommending the steps that the Minister considers to be necessary to achieve compliance with the condition.

[Section 48H inserted: No. 23 of 1996 s. 20.]

48I. Which proposals under assessed schemes to be referred to Authority

- (1) Despite section 38, when a proposal under an assessed scheme that appears likely, if implemented, to have a significant effect on the environment comes to the notice of the responsible authority in respect of the assessed scheme, that responsible authority shall determine whether or not —
 - (a) the environmental issues raised by that proposal were assessed in any assessment of the assessed scheme under this Division; and
 - (b) that proposal complies with the assessed scheme and any conditions to which the assessed scheme is subject.
- (2) If the responsible authority determines under subsection (1) that —
 - (a) the environmental issues raised by the proposal were assessed in any assessment of the assessed scheme under this Division; and
 - (b) the proposal complies with the assessed scheme and any conditions to which the assessed scheme is subject,

the responsible authority need not refer the proposal to the Authority under section 38.

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- (3) If the responsible authority determines under subsection (1) that —
- (a) one or more of the environmental issues raised by the proposal was or were not assessed in any assessment of the assessed scheme under this Division; or
 - (b) the proposal does not comply with the assessed scheme or one or more of the conditions to which the assessed scheme is subject,
- the responsible authority shall —
- (c) in its capacity as a decision-making authority refer the proposal to the Authority under section 38; or
 - (d) refuse to approve the implementation of the proposal.

[Section 48I inserted: No. 23 of 1996 s. 20.]

48J. Disputes between Minister and responsible Ministers, Governor to decide

If the Minister and a responsible Minister cannot agree —

- (a) on whether or not the Minister should give advice under section 48A(2)(b) in relation to a scheme; or
- (b) under the relevant scheme Act on whether or not an environmental review has been undertaken in accordance with the relevant instructions issued under section 48C(1)(a); or
- (c) on whether or not a direction should be given to the Authority under section 48D(2) or 48E(1) or, if a direction should be so given, what its content should be; or

(d) under section 48F —

(i) on whether or not the scheme to which a report relates should be implemented; or

(ii) if implementation is agreed to, on whether or not implementation should be subject to conditions; or

(iii) if implementation subject to conditions is agreed to, on what the conditions should be;

or

~~(d) on whether or not the scheme to which a report relates should be subject to conditions under section 48F or, if that scheme should be so subject, to what conditions it should be so subject; or~~

(e) on whether or not conditions referred to in section 48G(2) should be altered and, if so, to what extent,

the Minister and the responsible Minister shall refer the matter in dispute to the Governor and the decision of the Governor on that matter shall be final and without appeal.

[Section 48J inserted: No. 23 of 1996 s. 20.]

Part V — Environmental regulation

[Heading inserted: No. 54 of 2003 s. 35.]

Division 1 — Pollution and environmental harm offences

[Heading inserted: No. 54 of 2003 s. 35.]

49. Causing pollution and unreasonable emissions

(1) In this section —

unreasonable emission means an emission or transmission of noise, odour or electromagnetic radiation which unreasonably interferes with the health, welfare, convenience, comfort or amenity of any person.

(2) A person who intentionally or with criminal negligence —

- (a) causes pollution; or
- (b) allows pollution to be caused,

commits an offence.

(3) A person who causes pollution or allows pollution to be caused commits an offence.

(4) A person who intentionally or with criminal negligence —

- (a) emits an unreasonable emission from any premises; or
- (b) causes an unreasonable emission to be emitted from any premises,

commits an offence.

(5) A person who —

- (a) emits an unreasonable emission from any premises; or
- (b) causes an unreasonable emission to be emitted from any premises,

commits an offence.

(6) A person charged with committing an offence against subsection (2) may be convicted of an offence against subsection (3) which is established by the evidence.

(7) A person charged with committing an offence against subsection (4) may be convicted of an offence against subsection (5) which is established by the evidence.

[Section 49 inserted: No. 14 of 1998 s. 6; amended: No. 54 of 2003 s. 36.]

49A. Dumping waste

(1) In this section —

place includes water, a vehicle and a receptacle.

(2) A person who discharges or abandons, or causes or allows to be discharged or abandoned, any solid or liquid waste in water to which the public has access commits an offence.

(3) A person who discharges or abandons, or causes or allows to be discharged or abandoned, any solid or liquid waste on or in any place, other than water to which the public has access, commits an offence.

(4) It is a defence to a charge under subsection (3) for a person to show that the waste was discharged or abandoned in the place concerned with the consent of the person who controlled and managed that place.

(5) A person charged with committing an offence against subsection (2) or (3) may be convicted of an offence against the *Litter Act 1979* section 23 which is established by the evidence.

[Section 49A inserted: No. 48 of 2010 s. 4.]

50. Discharging waste in circumstances likely to cause pollution

(1) A person who intentionally or with criminal negligence —

(a) causes waste to be placed; or

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Division 1 Pollution and environmental harm offences

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- (b) allows waste to be placed,
in any position from which the waste —
 - (c) could reasonably be expected to gain access to any portion of the environment; and
 - (d) would in so gaining access be likely to result in pollution,
commits an offence.
- (2) A person who causes or allows waste to be placed in any position from which the waste —
 - (a) could reasonably be expected to gain access to any portion of the environment; and
 - (b) would in so gaining access be likely to result in pollution,
commits an offence.
- (3) A person charged with committing an offence against subsection (1) may be convicted of an offence against subsection (2) or section 49A(2) or (3) which is established by the evidence.
- (4) A person charged with committing an offence against subsection (2) may be convicted of an offence against section 49A(2) or (3) which is established by the evidence.

[Section 50 inserted: No. 14 of 1998 s. 6; amended: No. 48 of 2010 s. 5.]

50A. Causing serious environmental harm

- (1) A person who, intentionally or with criminal negligence —
 - (a) causes serious environmental harm; or
 - (b) allows serious environmental harm to be caused,
commits an offence.
- (2) A person who —
 - (a) causes serious environmental harm; or

(b) allows serious environmental harm to be caused,
commits an offence.

- (3) A person charged with committing an offence against subsection (1) may be convicted of an offence against subsection (2) which is established by the evidence.

[Section 50A inserted: No. 54 of 2003 s. 37.]

50B. Causing material environmental harm

- (1) A person who intentionally or with criminal negligence —
(a) causes material environmental harm; or
(b) allows material environmental harm to be caused,
commits an offence.

- (2) A person who —
(a) causes material environmental harm; or
(b) allows material environmental harm to be caused,
commits an offence.

- (3) A person charged with committing an offence against subsection (1) may be convicted of an offence against subsection (2) which is established by the evidence.

[Section 50B inserted: No. 54 of 2003 s. 37.]

50C. Court may find accused guilty of alternative offences if charged with causing serious environmental harm

A person charged with committing an offence against section 50A may be convicted of an offence against section 50B(1) or (2) or 51C which is established by the evidence.

[Section 50C inserted: No. 54 of 2003 s. 37.]

50D. Regulations may require authorisation for conduct that might cause pollution or environmental harm

(1) In this section —

authorisation means a licence, permit, approval or exemption granted, issued or given under the regulations;

conduct affecting the environment means —

- (a) causing or allowing anything to be discharged, emitted or transmitted; or
- (b) causing or allowing the nature or volume of anything discharged, emitted or transmitted to be changed; or
- (c) conduct, or an operation or activity, that is a potential cause of pollution or environmental harm; or
- (d) causing or allowing conduct, or an operation or activity, that is a potential cause of pollution or environmental harm.

(2) If the regulations require an authorisation to be held for conduct affecting the environment, a person who contravenes the regulations by —

- (a) engaging in that conduct without there being an authorisation in force in relation to it; or
- (b) engaging in that conduct in contravention of a condition to which an authorisation is subject,

commits an offence.

(3) Subsection (2) does not apply if a penalty for that contravention of the regulations is provided in the regulations.

[Section 50D inserted: No. 54 of 2003 s. 37.]

~~**51. Occupiers of premises, duties as to emissions**~~

~~The occupier of any premises who does not~~

- ~~(a) comply with any prescribed standard for an emission;~~
- ~~and~~

~~(b) take all reasonable and practicable measures to prevent or minimise emissions,~~
~~from those premises commits an offence.~~
~~[Section 51 amended: No. 54 of 2003 s. 38.]~~

1 Division 2 — Clearing of native vegetation

[Heading inserted: No. 54 of 2003 s. 110(1).]

51A. Terms used

In this Division —

area permit has the meaning given by section 51E(7);

clearing means —

- (a) the killing or destruction of; or
- (b) the removal of; or
- (c) the severing or ringbarking of trunks or stems of; or
- (d) the doing of any other substantial damage to,

some or all of the native vegetation in an area, and includes the draining or flooding of land, the burning of vegetation, the grazing of stock, or any other act or activity, that causes —

- (e) the killing or destruction of; or
- (f) the severing of trunks or stems of; or
- (g) any other substantial damage to,

some or all of the native vegetation in an area;

clearing principles means the principles for clearing native vegetation set out in Schedule 5;

environmentally sensitive area means an area that is the subject of a declaration that is in force under section 51B;

native vegetation has the meaning given by section 3(1) but does not include vegetation that was intentionally sown, planted or propagated unless —

- (a) that vegetation was sown, planted or propagated as required under this Act or another written law; or

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CME notes that there are issues and inconsistencies between the clearing framework in the EP Act and how this interplays with / interacts with the *Biodiversity Conservation Act 2016* (BC Act). These issues do not appear to be resolved.

For example, clearing within a threatened ecological community (TEC).

CME strongly recommends detailed analysis be done of the issues with the two Acts interacting and remedy where possible the issues through this amendment opportunity to the EP Act. In some instances, the BC Act may instead need to be amended.

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- (b) that vegetation is of a class declared by regulation to be included in this definition;

occupier of land means a person who is in occupation or control of the land, or who is entitled to be in occupation or control of the land;

owner of land means —

- (a) in relation to land alienated from the Crown, the holder (at law or in equity) of an estate in fee simple in the land; and
- (b) in relation to land that the Crown has lawfully agreed to alienate, the person who is entitled to the benefit of the agreement; and
- (c) in relation to land held under a lease lawfully granted by the Crown, the lessee; and
- (d) in relation to any other land, the public authority that has the care, control or management of the land or, if there is no such public authority, the Crown;

purpose permit has the meaning given by section 51E(8);

referred proposal means a proposal which has been referred to the Authority under section 38.

[Section 51A inserted: No. 54 of 2003 s. 110(1).]

51B. Declaration of environmentally sensitive areas by regulation

Regulations may declare as an environmentally sensitive area for the purposes of this Division —

- (a) an area of the State specified in the regulations; or
- (b) an area of the State of a class specified in the regulations.

51C. Unauthorised clearing of native vegetation

A person who causes or allows clearing commits an offence unless —

- (a) the clearing is done in accordance with a clearing permit; or

- (b) the clearing is of a kind set out in Schedule 6; or
- (c) the clearing is of a kind prescribed for the purposes of this paragraph and is not done in an environmentally sensitive area; or
- (d) the clearing is done after the person has received notice under section 51DA(5) that the CEO has decided that a clearing permit is not needed for the clearing.

51B. — Environmentally sensitive areas, declaration of

- ~~— (1) The Minister may, by notice, declare —~~
 - ~~— (a) an area of the State specified in the notice; or~~
 - ~~— (b) an area of the State of a class specified in the notice,~~
 - ~~— to be an environmentally sensitive area for the purposes of this Division.~~
 - ~~— (2) A notice under this section is subsidiary legislation for the purposes of the Interpretation Act 1984.~~
 - ~~— (3) Subsections (1), (2), (3), (5), (6) and (8)(a) of section 42 of the Interpretation Act 1984 apply to a notice under this section as if it were regulations within the meaning of that section.~~
 - ~~— (4) Before a notice is published under this section the Minister shall —~~
 - ~~— (a) seek comments on it from the Authority and from any public authority or person which or who has, in the opinion of the Minister, an interest in its subject matter; and~~
 - ~~— (b) take into account any comments received from the Authority or such a public authority or person.~~
- ~~[Section 51B inserted: No. 54 of 2003 s. 110(1).]~~

51C. — Unauthorised clearing of native vegetation

- ~~— A person who causes or allows clearing commits an offence unless the clearing —~~

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- ~~_____ (a) is done in accordance with a clearing permit; or~~
- ~~_____ (b) is of a kind set out in Schedule 6; or~~
- ~~_____ (c) is of a kind prescribed for the purposes of this section and is not done in an environmentally sensitive area.~~
- ~~_____ [Section 51C inserted: No. 54 of 2003 s. 110(1).]~~

51D. **Section 51C(a) does not apply to certain land****Application of**
~~**s. 51C(a) to certain land affected by Soil and Land**~~
~~**Conservation Act 1945**~~

- (1) In this section —
 - agreement to reserve** means an agreement to reserve as referred to in section 30B(2) of the SLC Act;
 - Commissioner** means the person for the time being holding or acting in the office of the Commissioner of Soil and Land Conservation under the SLC Act;
 - conservation covenant** means a conservation covenant as referred to in section 30B(2) of the SLC Act;
 - SLC Act** means the *Soil and Land Conservation Act 1945*;
 - soil conservation notice** has the same meaning as it has in Part V of the SLC Act.
- (2) Section 51C(a) does not apply to the clearing of vegetation on land the subject of an agreement to reserve unless —
 - (a) the clearing permit was granted; or
 - (b) the clearing is done,with the written approval of the Commissioner.
- (3) Section 51C(a) does not apply to the clearing of vegetation —
 - (a) on land the subject of a conservation covenant; or
 - (aa) on land the subject of an environmental protection covenant; or
 - (b) in contravention of a soil conservation notice.

[Section 51D inserted: No. 54 of 2003 s. 110(1).]

51DA. Referral of proposed clearing to CEO for decision on whether a clearing permit is needed

- (1) This section applies to clearing unless —
- (a) the clearing is of a kind set out in Schedule 6; or
 - (b) the clearing is of a kind prescribed for the purposes of section 51C(c) and is not proposed to be done in an environmentally sensitive area.
- (2) A person who proposes to do clearing to which this section applies must refer the proposed clearing to the CEO in the form and in the manner approved by the CEO.
- (3) ¹ The CEO must consider proposed clearing referred under subsection (2) and decide whether or not a clearing permit is needed for the proposed clearing.
- (4) In making a decision under subsection (3) the CEO must have regard to —
- (a) whether the area proposed to be cleared (the *area*) is small relative to the total remaining vegetation —
 - (i) within the region in which the area is situated; or
 - (ii) of the ecological community of which the vegetation proposed be cleared forms part;and
 - (b) whether there are any known or likely significant environmental values within the area; and
 - (c) whether the state of scientific knowledge about vegetation within the region in which the area is situated is adequate; and
 - (d) whether the issues that would arise as a result of the proposed clearing are likely to require conditions to manage or mitigate impacts on the environment.
- (5) ² The CEO must give the person who referred the proposed clearing notice in writing of the decision made by the CEO under subsection (3).

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Although CME supports the intent of introducing this referral and decision process (to allow the CEO to decide that a clearing permit is NOT needed), the majority of clearing that is typically done by CME members using a clearing permit will likely still require a clearing permit in the future. Therefore, introducing a mandatory referral, assessment and decision step in advance of that clearing permit assessment step is merely introducing an additional delay. There must be a mechanism in the Act that allows a person to bypass this referral, assessment, decision process and move straight in to the clearing permit process as the (inevitable) outcome of the referral process will be a decision that a permit must be applied for. The absence of this option is a significant concern to CME.

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A statutory timeframe should be included for the referral, assessment, decision process introduced by 51DA. After that period has lapsed, it should be that this be considered to be a deemed decision that a clearing permit is required so that the person may be able to continue through to the clearing permit process (if they choose to proceed) rather than continue waiting to hear back about their referral.

Comments from page 131 continued
on next page

51DA. Referral of proposed clearing to CEO for decision on whether a clearing permit is needed

- (1) This section applies to clearing unless —
- (a) the clearing is of a kind set out in Schedule 6; or
 - (b) the clearing is of a kind prescribed for the purposes of section 51C(c) and is not proposed to be done in an environmentally sensitive area.
- (2) A person who proposes to do clearing to which this section applies must refer the proposed clearing to the CEO in the form and in the manner approved by the CEO.
- (3) The CEO must consider proposed clearing referred under subsection (2) and decide whether or not a clearing permit is needed for the proposed clearing.
- (4) In making a decision under subsection (3) the CEO must have regard to —
- (a) whether the area proposed to be cleared (the *area*) is small relative to the total remaining vegetation —
 - (i) within the region in which the area is situated; or
 - (ii) of the ecological community of which the vegetation proposed be cleared forms part;and
 - (b) whether there are any known or likely significant environmental values within the area; and
 - (c) whether the state of scientific knowledge about vegetation within the region in which the area is situated is adequate; and
 - (d) whether the issues that would arise as a result of the proposed clearing are likely to require conditions to manage or mitigate impacts on the environment.
- (5) The CEO must give the person who referred the proposed clearing notice in writing of the decision made by the CEO under subsection (3).

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(6) Subject to the publication regulations, the CEO must publish in a prescribed manner —

- (a) the referral of proposed clearing under subsection (2); and
- (b) the notice given under subsection (5).

(7) If the person who referred the proposed clearing —

- (a) receives notice under subsection (5) that the CEO has decided that a clearing permit is needed for the proposed clearing; or
- (b) ¹ does not receive any notice under subsection (5) within the period of 21 days after referring the proposed clearing,

the person may, in writing, request the CEO to treat the referral of the proposed clearing as an application for a clearing permit under section 51E(1).

(8) ² a request is made under subsection (7), the referral may be dealt with under section 51E as an application that complies with section 51E(1) and (2) if —

- (a) the referral was made in the form and manner mentioned in subsection (2); and
- (b) the referral met the requirements set out in section 51E(1)(b) and (d) and (2); and
- (c) the request is accompanied by the fee referred to in section 51E(1)(c).

51E. **How applications for clearing permits, are made and dealt with applying for, granting, refusing etc.**

- (1) An application for a clearing permit ~~shall~~ must —
 - (a) be made in the form and in the manner approved by the CEO; and
 - (b) indicate whether it relates to —
 - (i) the clearing of a particular area specified in the application; or

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Although this appears to be an attempt at a statutory timeframe for the referral, assessment, decision process introduced by 51DA and a means to give a person a way to move forward if that timeframe has lapsed, as drafted, this doesn't appear to be strong enough.

After the 21 days, it is possible the person completes this request but this request may not be accepted / acknowledged etc so it is unclear how it automatically becomes a clearing permit application.

CME is concerned about potential delays and uncertainty of status from the process as currently drafted.

Number: 2 Author: CME WA Subject: Highlight Date: 25/01/2020 2:12:26 PM

The current drafting appears to create a validity issues as per *Forrest & Forrest Pty Ltd v Wilson & Ors* (2017) 262 CLR 510 (Forrest & Forrest), as it requires that if the form and fee are not all simultaneously received by the Department, the application must be declined by the CEO.

Strongly recommend removal of 'accompanied by'.

Please see also sections 51E(1)(c) and (d).

- (ii) the clearing of different areas from time to time for a purpose specified in the application;

and

- 1** be accompanied by the fee prescribed by or determined under the regulations; and

- (d) contain or be accompanied by any information required as indicated in the form or in material accompanying the form.

- ~~(d) be supported by any management plans, maps, and other documents and information required by the CEO and include a summary of that supporting documentation and information.~~

(1A) If the CEO requires further information to determine the application, the CEO may, by written notice given to the applicant, require the applicant to give the CEO further specified information within a specified time.

- (2) An application for a clearing permit can only be made —

- (a) if it relates to clearing referred to in subsection (1)(b)(i) —

- (i) by the owner of the land on which the clearing is proposed to be done or a person acting on the owner's behalf; or

- (ii) by a person who satisfies the CEO that the person is likely to become the owner of the land on which the clearing is proposed to be done;

or

- (b) if it relates to clearing referred to in subsection (1)(b)(ii), by the person by or on whose behalf the clearing is to be done.

(3) If an application does not comply with subsections (1) and (2), or further information is not provided in accordance with subsection (1A), the CEO must decline to deal with the application and advise the applicant accordingly.

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 Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020 2:12:47 PM

The current drafting may create a Forrest & Forrest issue, as it requires that if the form, fee and supporting information are not all simultaneously received by the Department, the application must be declined by the CEO.

Strongly recommend removal of 'accompanied by'.

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- (4) If, under subsection (3), the CEO declines to deal with the application, the CEO does not have to perform any function under subsection (4A) to (12) in relation to the application.
- (4A) The CEO must invite comments on the application within a period specified by the CEO from any public authority or person which or who has, in the opinion of the CEO, a direct interest in the subject matter of the application.
- (4B) Subject to the publication regulations, the CEO must publish in a prescribed manner —
- (a) the application; and
 - (b) the information mentioned in subsection (1)(d).
- (4C) When publishing the application and information under subsection (4B) the CEO must —
- 1 invite any person who wishes to comment on the application and information to do so; and
 - 2 specify the period within which comments can be made.
- ~~— (3) If an application made under subsection (1) does not comply with subsections (1) and (2), the CEO shall decline to deal with the application and advise the applicant accordingly.~~
- ~~— (4) If the application complies with subsections (1) and (2), the CEO shall —~~
- ~~— (a) advise the applicant that the application has been received; and~~
 - ~~— (b) invite any public authority or person which or who has, in the opinion of the CEO, a direct interest in the subject matter of the application, to comment on it within such period as the CEO specifies; and~~
 - ~~— (c) advertise the application in the prescribed manner, inviting any person who wishes to comment on it to do so within such period as is specified in the advertisement.~~

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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020
12:39:27 PM
Change '(b)' to '(a)'

 Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020
12:39:18 PM
Change '(c)' to '(b)'

(5) The CEO must, subject to this Division —

~~(5) The CEO shall, after having taken into account any comments received within the specified period from any public authority or person from which or whom comments were invited under subsection (4)(b) or (c) and subject to sections 51O and 51P —~~

- (a) grant a clearing permit subject to such of the conditions referred to in section 51H as the CEO specifies in the permit; or
- (b) refuse to grant a clearing permit.

(5A) In determining whether to grant a clearing permit and the conditions to which the clearing permit is to be subject, the CEO must take into account any comments made pursuant to an invitation under subsection (4A) or (4C) in respect of the application.

- (6) The CEO must ~~is to~~ give the applicant written notice of the refusal to grant a clearing permit.
- (7) If a clearing permit relates to clearing referred to in subsection (1)(b)(i), it —
 - (a) may be granted under subsection (5) for all or some of the clearing applied for; and
 - (b) is to describe the boundaries of the area that may be cleared; and
 - (c) is referred to for the purposes of this Division as an *area permit*.
- (8) If a clearing permit relates to clearing referred to in subsection (1)(b)(ii), it —
 - (a) is to describe the purpose for which the clearing may be done; and
 - (b) is to describe the principles and criteria that are to be applied, and the strategies and procedures that are to be followed, in relation to the clearing; and
 - (c) is referred to for the purposes of this Division as a *purpose permit*.

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- (9) In the case of an application made under subsection (2)(a)(ii), the CEO may, under subsection (5)(a), give the applicant a written undertaking that if the person becomes the owner of the land on which the clearing is proposed to be done, the CEO will, subject to subsection (10), grant a clearing permit to the applicant subject to such of the conditions referred to in section 51H as the CEO specifies in the undertaking.
- (10) A clearing permit cannot be granted pursuant to an undertaking mentioned in subsection (9) unless —
- (a) the applicant becomes the owner of the land on or before such day as is specified in the undertaking; and
 - (b) the CEO has been notified in writing that the applicant has become the owner of the land.

(10A) The CEO must publish in a prescribed manner notice of —

- (a) the grant of a clearing permit; or
- (b) a refusal to grant a clearing permit.

- (11) A reference in subsection (5)(b), (6), ~~(7)~~ (7)(a) or (10A)(a) or (b) or in section 51P(2) or 101A to granting or refusing to grant a clearing permit includes a reference to giving or refusing to give an undertaking mentioned in subsection (9).
- (12) A reference in section 101A to the specification of a condition in a clearing permit includes a reference to the specification of a condition in an undertaking mentioned in subsection (9).

[Section 51E inserted: No. 54 of 2003 s. 110(1).]

51F. Effect of referred proposal on decisions about clearing

(1) In this section —

clearing decision means —

- (a) a decision under section 51DA(3) as to whether or not a clearing permit is needed for proposed clearing; or
- (b) a decision under section 51E(5) to grant or refuse to grant a clearing permit for proposed clearing.

- (2) For the purposes of this section, proposed clearing is related to a referred proposal if the clearing, while not part of the referred proposal, is connected or associated with it in such a way that the clearing would not need to be done if the implementation of the referred proposal did not proceed.
- (3) Despite subsection (2), clearing that is proposed so that tests, surveys, investigations or other work can be done —
- (a) to comply with a requirement made under section 40(2)(a), (aa) or (b); or
- (b) under section 40(2a),
- for the purposes of assessing a referred proposal is not related to the referred proposal for the purposes of this section.
- (4) While any decision-making authority is precluded by section 41 from making a decision that could have the effect of causing or allowing a referred proposal to be implemented, the CEO must not make a clearing decision concerning proposed clearing that is ¹ated to the referred proposal.
- (5) The CEO must not make a clearing decision concerning proposed clearing that is related to a referred proposal if the decision is contrary to, or otherwise than in accordance with, an implementation agreement or decision.
- (6) Subsections (4) and (5) do not apply if the proposed clearing is for the purpose of doing minor or preliminary work to which the Authority has consented under section 41A(3).
- (7) If a decision-making authority makes a decision that has the effect of preventing the implementation of a proposal to which proposed clearing is related, the CEO does not have to make a clearing decision concerning the proposed clearing while the decision-making authority's decision has effect.

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CME is concerned by the broad nature of "related".

In a mining context, all infill, near field and brownfield explorations for example would be 'related' to assessed proposal(s) and hence so would their fly camps, hydrogeological investigations and potable water source investigations etc. Some of these early works and ancillary works will be able to be multi- or regional use activities which should be allowed to proceed as they are not material to the referred proposal or purely and only linked to the referred proposal but arguable are 'related' to the referred proposal (especially at risk if exploration is for replacement tonnes). The prohibition must be for works that are materially linked not 'related'.

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~~51F. Application for clearing permit related to proposal, limits on deciding~~

- ~~(1) If an application for a clearing permit made under section 51E(1) is related to a proposal which has been referred to the Authority under section 38, the CEO shall not perform any duty imposed on the CEO by section 51E(5) —~~
- ~~(a) while any decision-making authority is precluded by section 41 from making any decision which could have the effect of causing or allowing that proposal to be implemented; or~~
- ~~(b) contrary to, or otherwise than in accordance with, an implementation agreement or decision.~~
- ~~(2A) Subsection (1) does not apply if the application is for a clearing permit for the purpose of doing minor or preliminary work to which the Authority has consented under section 41A(3).~~
- ~~(2) If a decision-making authority makes a decision that has the effect of preventing the implementation of a proposal to which an application for a clearing permit made under section 51E(1) is related, the CEO does not have to perform any duty imposed under section 51E(5) while that decision has effect.~~
- ~~[Section 51F inserted: No. 54 of 2003 s. 110(1); amended: No. 40 of 2010 s. 15.]~~

51G. Duration of clearing permits

Subject to this Act, a clearing permit continues in force —

- (a) if it is an area permit, for 2 years; or
(b) if it is a purpose permit, for 5 years,

from the date on which it is granted unless another period is specified in the permit.

[Section 51G inserted: No. 54 of 2003 s. 110(1).]

51H. Clearing permit conditions

- (1) A clearing permit may be granted subject to such conditions as the CEO considers to be necessary or convenient for the purposes of preventing, controlling, abating or mitigating environmental harm or offsetting the loss of the cleared vegetation.
- (2) Section 51I sets out some kinds of conditions that may be attached to a clearing permit and further kinds of conditions may be prescribed, but nothing in that section or the regulations prevents other conditions from being attached.
- (3) The CEO is not to attach —
 - (a) a condition that would, in the CEO's opinion, be seriously at variance with the clearing principles except to the extent necessary to give effect to a decision made under section 51O(3); or
 - (b) subject to section 51P, a condition that would be inconsistent with an approved policy.

[Section 51H inserted: No. 54 of 2003 s. 110(1).]

51I. Some kinds of conditions

- (1) A condition may specify activities that are authorised, or not authorised, by the clearing permit.
- (2) The following list sets out things that the holder of a clearing permit can be required to do (at the expense of the holder) under conditions attached to the clearing permit —
 - (a) take specified measures for the purpose of —
 - (i) preventing, or minimising the likelihood of, environmental harm; or
 - (ii) controlling or abating environmental harm either generally or in accordance with specified criteria;
 - (b) establish and maintain vegetation on land other than land cleared under the permit in order to offset the loss of the cleared vegetation, or make monetary contributions to a

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fund maintained for the purpose of establishing or maintaining vegetation;

(c) give an environmental undertaking in relation to specified land other than land cleared under the permit;

(ca) arrange for an environmental protection covenant to be given by a specified person other than the permit holder in relation to specified land other than land cleared under the permit;

~~(c) give a conservation covenant or agreement to reserve under section 30B of the *Soil and Land Conservation Act 1945*, or some other form of binding undertaking to establish and maintain vegetation, in relation to land other than land cleared under the permit;~~

(d) monitor operations (including abatement operations) and environmental harm, conduct analysis of monitoring data, and provide reports on monitoring data, and analysis of it, to the CEO;

(e) investigate options for measures for preventing, controlling or abating environmental harm;

(f) conduct environmental risk assessment studies;

(g) provide reports on audits and studies, including audit compliance reports, to the CEO;

(h) prepare, implement and adhere to environmental management systems, environmental management plans and environmental improvement plans;

(i) have something required to be done under a condition done by a person of a class approved by the CEO;

(j) do something required to be done under a condition —
(i) within a specified period or before a specified date; or

(ii) in a specified form or manner.

(2A) If a condition of a clearing permit requires the holder of the permit to give or arrange the giving of an environmental undertaking as referred to in subsection (2)(c) or (ca), the

condition can require that the holder of the permit not cause or allow clearing on any land on which clearing is authorised by the permit until the environmental undertaking is given.

- (3) Without limiting subsection (2) paragraph (d), a condition referred to in that paragraph can require the holder of a clearing permit to carry out a specified monitoring programme for the purpose of supplying the CEO with information relating to the nature and extent of any impacts or potential impacts the activities under the permit may have on the environment or any environmental value.

- (4) In this section —

establish includes conserve;

specified means specified by the CEO in the clearing permit concerned.

[Section 51I inserted: No. 54 of 2003 s. 110(1).]

51J. Contravening clearing permit conditions

- (1) The holder of a clearing permit who contravenes a condition to which the permit is subject commits an offence.
- (2) If a clearing permit is subject to a condition referred to in section 51I(2)(c) or (ca), ~~section 51I(2)(e)~~, a reference in this Division to a contravention of a condition includes a reference to a contravention of the covenant, agreement or undertaking given by the permit holder.

[Section 51J inserted: No. 54 of 2003 s. 110(1).]

51K. Amending clearing permit

- (1) The CEO may amend a clearing permit by —
- (a) removing or varying any condition to which the clearing permit is subject; or
 - (b) subjecting the clearing permit to a new condition; or
 - (c) in the case of an area permit, redesccribing the boundaries of the area that may be cleared under the permit or of

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land to which a condition referred to in section 51I(2)(b) or (c) applies; or

(ca) in the case of a purpose permit, adding, deleting, modifying or redescribing a purpose for which clearing may be done under the permit; or

(d) in the case of a purpose permit, redescribing any of the principles or criteria that are to be applied, or the strategies or procedures that are to be followed, in relation to the clearing; or

(e) correcting in the clearing permit —

- (i) a clerical mistake or unintentional error or omission; or
- (ii) a figure which has been miscalculated; or
- (iii) the misdescription of any person, thing, area, property or activity;

or

(f) making an administrative change to the format of the clearing permit which does not alter the obligations of the permit holder; or

(g) amending the clearing permit in conformity with an approved policy or with an exemption conferred under this Act; or

(h) amending the clearing permit to give effect to a decision of the Minister under this Act (whether on an appeal or otherwise); or

(i) extending the duration of the clearing permit.

(2) A clearing permit may be amended on application by the holder of the permit or on the initiative of the CEO.

[Section 51K inserted: No. 54 of 2003 s. 110(1).]

51L. Revoking or suspending clearing permit

(1) The CEO may revoke or suspend a clearing permit.

- (2) The grounds for revocation or suspension of a clearing permit are that —
- (a) the CEO is satisfied that there has been a contravention ~~breach~~ of any of the conditions to which the clearing permit is subject; or
 - (b) where a person has become the holder of the clearing permit by operation of section 51N, the CEO is satisfied that the person is unwilling or unable to comply with the conditions to which the permit is subject; or
 - (c) information contained in or supporting the application was false or misleading in a material respect ~~respect; or~~
 - ~~(d) the holder of the clearing permit has applied to the CEO to surrender the permit.~~

[Section 51L inserted: No. 54 of 2003 s. 110(1).]

51M. Procedure for amending, revoking or suspending clearing permit

- (1) 1^h application for an amendment to a clearing permit must ~~— or~~ ~~to surrender a clearing permit is to —~~
- (a) be made in the manner and form approved by the CEO; and
 - (b) be accompanied by the fee prescribed by or determined under the regulations; and
 - (c) contain or be accompanied by any information required as indicated in the form or in material accompanying the form.
 - ~~(e) be supported by any management plans, maps, and other documents and information required by the CEO and include a summary of that supporting documentation and information.~~

(1A) If the CEO requires further information to determine the application, the CEO may, by written notice given to the applicant, require the applicant to give the CEO further specified information within a specified time.

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The current drafting may create a Forrest & Forrest issue, as it requires that if the form, fee and supporting information are not all simultaneously received by the Department, the application must be declined by the CEO.

Strongly recommend removal of 'accompanied by'.

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(1B) If an application for an amendment to a clearing permit does not comply with subsection (1), or further information is not provided in accordance with subsection (1A), the CEO ¹ must decline to deal with the application and advise the applicant accordingly.

- (2) Before amending, revoking or suspending a clearing permit the CEO ~~must is to~~ give the holder of the permit a written notice under this section.
- (3) The notice ~~must is to~~ —
- (a) state details of the proposed action; and
 - (b) invite the holder to make representations to the CEO to show why the action should not be taken; and
 - (c) state the period (at least 28 days after the notice is given to the holder) within which representations may be made.
- (4) The representations must be made in writing.
- (5) Subject to subsection (8), the CEO may take the proposed action —
- (a) at any time after the holder of the clearing permit gives the CEO written notice that the holder does not intend to make any representations or any further representations; or
 - (b) if such notice is not given, after the end of the period stated in the notice within which representations may be made.
- (6) The CEO ~~must is to~~ consider any representations properly made by the holder of the clearing permit.
- (7) If the proposed action is —
- (a) the revocation or suspension of the clearing permit; or

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Change 'must' to 'may'

- (b) an amendment of the clearing permit reducing or restricting the extent or method of clearing that may be done,

the permit, by force of this subsection, ceases to have effect until —

- (c) notice of any amendment, revocation or suspension of the permit is given under subsection (10); or
- (d) after considering any representations properly made by the holder of the permit, the CEO gives the holder written notice that the action will not be taken.

(7A) For the purposes of this section, an amendment of a clearing permit (a *proposed amendment*) is ¹ated to a referred proposal if the proposed amendment is connected or associated with the referred proposal in such a way that the proposed amendment would not need to be made if the implementation of the referred proposal did not proceed.

(7B) While any decision-making authority is precluded by section 41 from making a decision in relation to a referred proposal, the CEO must not make a proposed amendment that is related to the referred proposal.

(8) The CEO must not make a proposed amendment that is related to a referred proposal if the proposed amendment is contrary to, or otherwise than in accordance with, an implementation agreement or decision.

(9) If a decision-making authority makes a decision that has the effect of preventing the implementation of a referred proposal to which a proposed amendment is related, the CEO does not have to make a decision as to the proposed amendment while the decision-making authority's decision has effect.

~~—(8) If the proposed action is related to a proposal which has been referred to the Authority under section 38, the CEO is not to so amend, revoke or suspend—~~

~~—(a) while any decision-making authority is precluded by section 41 from making any decision which could have~~

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CME is concerned by the broad nature of "related". See comments in s51F(4).

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~~the effect of causing or allowing that proposal to be implemented; or~~

~~(b) contrary to, or otherwise than in accordance with, an implementation agreement or decision.~~

~~(9) If a decision-making authority makes a decision that has the effect of preventing the implementation of a proposal to which an amendment proposed under this section is related, the CEO does not have to make a decision on the amendment while the decision-making authority's decision has effect.~~

(10) The CEO ~~must~~ is to give the holder of the clearing permit written notice of any amendment, revocation or suspension of the permit.

(11) Without limiting subsection (10), notice of an amendment can be given in the form of a revised clearing permit.

(12) Subsections (2) to (9) do not apply to anything done by the CEO under section 110 to give effect to a decision of the Minister under section 107(2) or 109(3) on an appeal.

[Section 51M inserted: No. 54 of 2003 s. 110(1).]

51NA. Surrendering a clearing permit

(1) The holder of a clearing permit may apply to the CEO to surrender the permit.

(2) **1** application to surrender a clearing permit must —

(a) be made in the form and in the manner approved by the CEO; and

(b) contain or be accompanied by any information required as indicated in the form or in material accompanying the form; and

(c) be accompanied by the fee prescribed by or determined under the regulations.

(3) If the CEO requires further information to determine the application, the CEO may, by written notice given to the

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The current drafting may create a a Forrest & Forrest issue, as it requires that if the form, fee and supporting information are not all simultaneously received by the Department, the application must be declined by the CEO.

Strongly recommend removal of 'accompanied by'.

applicant, require the applicant to give the CEO further specified information within a specified time.

- (4) If the application does not comply with subsection (2), or further information is not provided in accordance with subsection (3), the CEO must decline to deal with the application and advise the applicant accordingly.
- (5) If, under subsection (4), the CEO declines to deal with the application, the CEO does not have to perform any function under subsection (6) or (7) in relation to the application.
- (6) The CEO must consider the application and may —
 - (a) accept the surrender; or
 - (b) if not satisfied that the conditions of the clearing permit have been complied with, refuse to accept the surrender.
- (7) The CEO is to give the holder of the clearing permit written notice of the CEO's decision on the application.
- (8) If the CEO accepts the surrender the clearing permit ceases to be in force when the notice under subsection (7) is given.

51N. Continuation of area permit on change of ownership

- (1) If an area permit is held by the owner of the land to which the permit relates and the interest by reason of which that person is the owner (the *interest*) is or is to be transferred, or passes or is to pass, to another person (the *new owner*), the new owner may, in the form and in the manner approved by the CEO, notify the CEO —
 - (a) that the transfer or passing of the interest has occurred or is to occur; and
 - (b) that the new owner wishes to become the holder of the permit.
- (2) If notification is given to the CEO under subsection (1) then —
 - (a) on the transfer or passing of the interest; or

- (b) on the receipt of the notification by the CEO,
whichever is later, the new owner becomes the holder of the
area permit by operation of this section on the conditions to
which the permit is subject.
- (3) If when the interest is transferred or passes the CEO has not
received notification under subsection (1), the area permit has
no further effect unless and until such notification is received.
[Section 51N inserted: No. 54 of 2003 s. 110(1).]

**51O. Principles and instruments to be considered when making
decisions as to clearing permits**

- (1) In this section —
clearing matter means —
(a) an application for a clearing permit; or
(b) an amendment of a clearing permit;
decision means a decision about a clearing matter. ~~clearing
matter;~~
~~**planning instrument** means —~~
~~(a) a scheme or a strategy, policy or plan made or adopted
under a scheme; or~~
~~(b) a State planning policy approved under section 29 of the
Planning and Development Act 2005 and published in
the *Gazette*; or~~
~~(c) a local planning strategy made under the *Planning and
Development Act 2005*.~~
- (2) In considering a clearing matter the CEO shall have regard to
the clearing principles so far as they are relevant to the matter
under consideration.
- (3) The CEO may make a decision that is seriously at variance with
the clearing principles if, and only if, in the CEO's opinion there
is a good reason for doing so. That reason must be recorded and
published under section 51Q.

- (4) In considering a clearing matter the CEO shall have regard to any [development approval](#), planning instrument, or other matter, that the CEO considers relevant.

*[Section 51O inserted: No. 54 of 2003 s. 110(1); amended:
No. 38 of 2005 s. 15.]*

51P. Relationship between clearing permits and approved policies

- (1) In considering —
- (a) an application for a clearing permit; or
 - (b) an amendment of a clearing permit,
- the CEO shall ensure that the clearing permit, or its amendment, is consistent with any approved policy.
- (2) The CEO shall not amend or shall refuse to grant a clearing permit if the CEO considers that the associated effect on the environment would be inconsistent with any approved policy.
- (3) Despite anything in this section —
- (a) if the CEO is satisfied that, as a result of environmental circumstances having changed, the environment or an environmental value of the area concerned requires a higher level of protection than would be provided by the standards required by or under any approved policy, the CEO may grant or amend a clearing permit so as to make the permit subject to conditions which specify standards that are more stringent than those required by or under the approved policy;
 - (b) if the CEO is satisfied that, as a result of the approval under section 31(d) of a new approved policy or as a result of an approved policy as amended being confirmed under section 37, any condition to which an existing clearing permit is subject is inconsistent with that approved policy, the CEO may amend that permit to make it consistent with that approved policy.

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(4) Subsection (3) does not authorise the imposition of a condition that is contrary to, or not in accordance with, an implementation agreement or decision.

[Section 51P inserted: No. 54 of 2003 s. 110(1).]

51Q. CEO to keep and publish record of clearing permits etc.

(1) The CEO must keep a record of —

(a) such particulars of the following as are prescribed —

(i) applications for clearing permits;

(ii) clearing permits and undertakings mentioned in section 51E(9);

(iii) notifications received under section 51N(1);

(iv) environmental protection covenants;

and

(b) such other information and documents relating to clearing permits as are prescribed.

~~— (1) The CEO is to keep a record of such particulars of —~~

~~— (a) applications for clearing permits; and~~

~~— (b) clearing permits and undertakings mentioned in section 51E(9); and~~

~~— (c) notifications received under section 51N(1);~~

~~— as are prescribed.~~

(2) The CEO must publish ~~is to publish from time to time~~ in a prescribed manner prescribed particulars of the record.

[Section 51Q inserted: No. 54 of 2003 s. 110(1).]

51R. Evidentiary matters

(1) In this section —

captured includes taken;

image includes —

(a) a photograph; and

(b) a digital image;

image data source means a website, database, data storage facility or other body or source of information —

(a) containing or including either or both of the following —

(i) remotely sensed images;

(ii) digital or electronic information from which remotely sensed images can be produced;

and

(b) declared by the regulations to be an image data source for the purposes of this section;

official document means a document purporting to be signed by the Surveyor General or the CEO;

remotely sensed image means an aerial photograph or any other image of land captured using airborne equipment or equipment mounted in or on a satellite.

(1A) In this section a reference to the **capture** of an image includes a reference to the capture of digital or electronic information from which the image was produced.

(1B) For the purposes of this section, a remotely sensed image derived from an image data source —

(a) is to be taken to have been captured on the date recorded or shown in the image data source as being the date on which the image was captured ¹nd

(b) is to be taken to be an image of the land recorded or shown in the image data source as being the land to which the image relates.

(1C) In proceedings under this Division a remotely sensed image of land is evidence of the vegetation on the land, and its condition, on the date on which the image was captured.

(1D) Subsection (1C) applies to an image even if it, or the information from which it was produced, has been modified or

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Add a semicolon - change to "[...] which the image was captured; and [...]"

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enhanced so that colours, tones or brightness more accurately represent what would be visible with the naked eye.

(1E) In proceedings under this Division an official document certifying —

- (a) that an image comprising or specified in the document is, or is a true copy of, a remotely sensed image of land; and
- (b) that an image comprising or specified in the document is derived from an image data source; and
- (c) that the image data source from which an image comprising or specified in the document is derived records or shows a date specified in the document as being the date on which the image was captured; and
- (d) that the image data source from which an image comprising or specified in the document is derived records or shows land specified in the document as being the land to which the image relates; and
- (e) that a remotely sensed image of land comprising or specified in the document has been marked to correctly identify, and correctly show the boundaries of, the land according to records held by the Western Australian Land Information Authority established by the *Land Information Authority Act 2006* section 5,

or any of those matters, is, in the absence of proof to the contrary, taken to be proof of the matters certified.

(1F) In subsection (1E)(e) a reference to the marking of an image is a reference to the marking or modification of the image, or the information from which it was produced, by the application of computer software or by other means.

~~—(1) In proceedings under this Division a document purporting to be—~~

- ~~(a) a true copy of an aerial photograph marked so as to identify, and show the boundaries of, land according to official survey; and~~

- ~~— (b) signed and certified by the Surveyor General as being a true copy of a photograph taken under the authority of the Surveyor General on the date specified in the certificate and as correctly identifying, and showing the boundaries of, the land according to official survey;~~
- ~~— is, without proof of the signature of the Surveyor General, admissible as evidence of the matters so certified and of the condition, on the date so specified, of the vegetation on the land so identified.~~
- (2) An image, or a document comprising or specifying an image, must not be admitted pursuant to this section ~~A document shall not be admitted pursuant to subsection (1)~~ as evidence that the land has been cleared contrary to this Division unless the court is satisfied that, after the time at which the image was captured, ~~satisfied that~~ the Minister, the CEO or a person acting with the authority of the Minister or of the CEO has entered upon and inspected the land for the purposes of ascertaining whether the land has been so cleared.
- (3) Where, in a prosecution for an offence under this Division involving clearing, it is proved that clearing has taken place on land —
- (a) the person who was the occupier of the land at the time of the clearing is to be regarded as having caused the clearing in the absence of evidence to the contrary; and
 - (b) the person who was the owner of the land at the time of the clearing is to be regarded as having allowed the clearing in the absence of proof to the contrary.
- (4) Subsection (3) does not affect the liability of any other person for the offence concerned.
- (5) In a prosecution for an offence under this Division, an averment in the prosecution notice to the effect that vegetation is or was native vegetation is to be regarded as having been proved in the absence of proof to the contrary.

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s. 51S

- (6) For the purposes of this Division, if —
- (a) land is shared by a corporation and a subsidiary or subsidiaries of the corporation; and
 - (b) the corporation or a subsidiary referred to in paragraph (a) is the holder of a clearing permit in respect of an area situated on the land; and
 - (c) a condition to which the clearing permit is subject is contravened,

the permit holder is to be regarded as having caused the contravention unless the contrary is proved.

~~(7) In subsection (6) —~~

~~— *corporation* has the meaning given by the *Corporations Act 2001* of the Commonwealth;~~

~~— *subsidiary* has the meaning given by the *Corporations Act 2001* of the Commonwealth.~~

[Section 51R inserted: No. 54 of 2003 s. 110(1); amended: No. 84 of 2004 s. 80.]

~~51S. Clearing injunctions~~

~~(1) In this section —~~

~~— *contravention* includes the continuation of a contravention;~~

~~— *court* means the Supreme Court;~~

~~— *improper conduct* means an act or omission constituting a contravention of, or involvement in a contravention of, section 51C or 51J;~~

~~— *involvement in a contravention* means —~~

- ~~(a) aiding, abetting, counselling, or procuring the contravention; or~~
- ~~(b) inducing the contravention, whether by threats or promises or otherwise; or~~
- ~~(c) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or~~

- ~~———— (d) conspiring with others to effect the contravention; or~~
- ~~———— (e) attempting to do anything constituting involvement in a contravention under paragraph (a), (b), (c) or (d).~~
- ~~———— (2) Without limiting any other power the court may have to grant injunctive relief, it is declared that the court may grant an injunction to prevent a person from engaging in improper conduct (a **clearing injunction**).~~
- ~~———— (3) The CEO may apply for a clearing injunction.~~
- ~~———— (4) A clearing injunction may be granted if the court is satisfied that it would be appropriate to grant the injunction —~~
 - ~~———— (a) whether or not it is proved that the person intends to engage, or to engage again, or to continue to engage, in improper conduct of the kind sought to be prevented by the injunction; and~~
 - ~~———— (b) whether or not the person has previously engaged in improper conduct of that kind.~~
- ~~———— (5) An interim clearing injunction may be granted before final determination of an application for a clearing injunction.~~
- ~~———— (6) The court is not to require, as a condition of granting an interim clearing injunction, that an undertaking be given as to damages or costs.~~
- ~~———— (7) The taking of proceedings against any person for an offence under this Act is not affected by —~~
 - ~~———— (a) the making of an application for a clearing injunction; or~~
 - ~~———— (b) the grant or refusal of a clearing injunction or an interim clearing injunction; or~~
 - ~~———— (c) the rescission, variation, or expiry of a clearing injunction or an interim clearing injunction.~~
- ~~———— [Section 51S inserted: No. 54 of 2003 s. 110(1).]~~

51T. Other laws as to clearing vegetation not affected by this Division

Despite section 5, the operation of any other enactment under which a permit, permission, licence, approval or other authorisation is required in relation to the clearing of vegetation is not affected by —

- (a) this Division; or
- (b) the grant of a clearing permit under this Division,

and this Division has effect in addition to that enactment.

[Section 51T inserted: No. 54 of 2003 s. 110(1).]

Division 3 — Licences

Subdivision 1 — Preliminary

52. Terms used

In this Division —

controlled work means —

- (a) work at premises that is designed to enable a prescribed activity that is not authorised by a licence to be carried out at the premises;
- (b) work at premises that is designed to change the way of carrying out a prescribed activity that is authorised by a licence to be carried out at the premises if the change will —
 - (i) cause an emission that is not authorised by the licence; or
 - (ii) result in an alteration in the nature or volume of an emission authorised by the licence;
- and
- (c) any other thing that is specified by the regulations as being controlled work for the purposes of this definition.

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 Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020 2:14:28 PM

The current drafting of s52(a) is inconsistent with s53(1)(a) and 53(1)(b) which do not allow controlled work or a prescribed activity unless authorised by a licence. To clarify, recommend rewording to:

"work at premises that is designed to enable a prescribed activity that is not already authorised by a licence to be carried out at the premises [...]" and then fix drafting in latter sections to ensure logic.

 Number: 2 Author: CME WA Subject: Highlight Date: 16/01/2020 7:42:00 AM

These should not all be 'and' statements. It should be one or more so may need to alter above to say 'controlled work means one or more of ... ' or change 'and' to 'and / or'.

The probability that all these situations would arise simultaneously in order to fulfil and 'and' requirement are slim.

 Number: 3 Author: CME WA Subject: Highlight Date: 16/01/2020 12:17:34 PM

A risk-based approach is needed with regards to what is captured under the definition of controlled works. Controlled works should include works which result in physical modifications to plant bringing about a material or significant increase of existing emissions, and new emissions only.

It is recommended that 'designed' be removed from the definition as

Comments from page 156 continued on next page

51T. Other laws as to clearing vegetation not affected by this Division

Despite section 5, the operation of any other enactment under which a permit, permission, licence, approval or other authorisation is required in relation to the clearing of vegetation is not affected by —

- (a) this Division; or
- (b) the grant of a clearing permit under this Division,

and this Division has effect in addition to that enactment.

[Section 51T inserted: No. 54 of 2003 s. 110(1).]

Division 3 — Licences

Subdivision 1 — Preliminary

52. Terms used

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(b) work at premises that is designed to change the way of carrying out a prescribed activity that is authorised by a licence to be carried out at the premises if the change will —

(i) cause an emission that is not authorised by the licence; or

(ii) result in an alteration in the nature or volume of an emission authorised by the licence;

4^d

(c) any other thing that is specified by the regulations as being controlled work for the purposes of this definition.

this implies that design modifications are considered controlled work. Modification of plant design should not be considered controlled work as this can occur frequently with multiple iterations prior to implementation.

The phrase 'change the way' is ambiguous and should be removed.

The current definition would for example include changes designed to reduce or eliminate emissions or improve emissions management below existing licensed activity thresholds.

 Number: 4 Author: CME WA Subject: Highlight Date: 13/01/2020
12:37:39 PM

Change 'and' to 'or'

1 it does not include anything that is specified by the regulations as not being controlled work for the purposes of this definition;

2 work includes —

(a) the construction or alteration of any building or structure; and

(b) the installation or alteration of any plant or equipment.

3. Purpose of licence

(1) A licence may be granted for the following purposes —

(a) to authorise the carrying out of controlled work;

4 to authorise the carrying out of a prescribed activity;

(c) to 5 deal with the carrying out of an activity that would be a prescribed activity if it met the prescribed threshold for that category of activity.


(2) A licence may be granted or amended so as to cover any or all of the work and activities referred to in subsection (1).

(3) Without limiting subsection (1) a licence authorising the carrying out of a prescribed activity may provide that the prescribed activity is only authorised to be carried out at premises specified in the licence.


(4) A licence authorising or dealing with the carrying out of work or activity may prohibit, authorise, control or regulate any act, omission, emission or impact on the environment related to the work or activity to an extent, and in a manner, considered by the CEO to be necessary or convenient for the purposes of this Act relating to the prevention, control, abatement or mitigation of pollution or environmental harm.

(5) Subsection (4) does not limit Subdivision 5.


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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020 12:37:32 PM


Update formatting - indent.

 Number: 2 Author: CME WA Subject: Highlight Date: 17/01/2020 10:57:19 AM


Inclusion of 'alteration' in this definition of work would be considered to include plant, equipment or building maintenance which is not reasonable. Strongly recommend rewording this definition to remove consideration of maintenance activities.

 Number: 3 Author: CME WA Subject: Highlight Date: 16/01/2020 7:59:22 AM

Support the regulation of prescribed activities in principle however still require further thought and clearer drafting regarding the interaction this then has with offences and potential defences and the emissions that occur outside certain areas.

 Number: 4 Author: CME WA Subject: Highlight Date: 13/01/2020 12:37:06 PM

See comments above on 52(a).

 Number: 5 Author: CME WA Subject: Highlight Date: 13/01/2020 12:36:58 PM

Change 'deal' to 'authorise'. The licence must authorise the carrying out of an activity that would be a prescribed activity if it met the prescribed threshold for a category of activity, to 'deal' does not

Comments from page 157 continued
on next page

but does not include anything that is specified by the regulations as not being controlled work for the purposes of this definition;

work includes —

(a) the construction or alteration of any building or structure; and

(b) the installation or alteration of any plant or equipment.

53. Purpose of licence

(1) A licence may be granted for the following purposes —

(a) to authorise the carrying out of controlled work;

(b) to authorise the carrying out of a prescribed activity;

(c) to deal with the carrying out of an activity that would be a prescribed activity if it met the prescribed threshold for that category of activity.

(2) A licence may be granted or amended so as to cover any or all of the work and activities referred to in subsection (1).

(3) **6** Without limiting subsection (1) a licence authorising the carrying out of a prescribed activity may provide that the prescribed activity is only authorised to be carried out at premises specified in the licence.

(4) A licence authorising or dealing with the carrying out of work or activity may prohibit, authorise, control or regulate any act, omission, emission or impact on the environment related to the work or activity to an extent, and in a manner, considered by the CEO to be necessary or convenient for the purposes of this Act relating to the prevention, control, abatement or mitigation of pollution or environmental harm.

(5) Subsection (4) does not limit Subdivision 5.

convey any authority.

Number: 6 Author: CME WA Subject: Highlight Date: 25/01/2020
2:15:29 PM

The alternative scenario should also be possible (presumably) that a licence could authorise an activity to occur except in specific premises / areas. For example, a mobile concrete batching plant may be permitted anywhere in WA where it is not an environmentally sensitive area / the land holder has given written permission, and it is not within #m of a residential building etc. Does the drafting allow for this?

Subdivision 2 — Requirement for licence

1A. Licence for controlled work

- (1) A person who carries out controlled work, or causes or allows controlled work to be carried out, commits an offence unless —
- (a) the carrying out of the controlled work is authorised by a licence; and
 - (b) the person —
 - (i) is the holder of the licence; or
 - (ii) is directly or indirectly engaged, authorised or permitted by the holder of the licence to carry out the controlled work.
- (2) Subsection (1) does not apply to controlled work carried out in accordance with a requirement in a notice given or issued under Division 4.

53B. Licence for prescribed activity

- (1) A person who carries out a prescribed activity, or causes or allows a prescribed activity to be carried out, commits an offence unless —
- (a) the carrying out of the prescribed activity is authorised by a licence; and
 - (b) the person —
 - (i) is the holder of the licence; or
 - (ii) is directly or indirectly engaged, authorised or permitted by the holder of the licence to carry out the prescribed activity.
- (2) Subsection (1) does not apply to a prescribed activity carried out in accordance with a requirement in notice given or issued under Division 4.

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Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020 2:15:51 PM

For concision, recommend collapse s53A and 53B into one.

Controlled works are in relation to a prescribed activity and are anticipated to be regulated on the same licence through staging conditions (i.e. conditions for construction, installation, commissioning, operation and decommissioning). Consequently, a licence for controlled works will inevitably be a licence for prescribed activity (so combine s53A & 53B), and so s54(2)(c) is redundant.

Subdivision 3 — Applications


53C. Kinds of application

- (1) A person may apply to the CEO for a licence.
- (1) The holder of a licence may apply to the CEO —
- (a) for the amendment of the licence; or
 - (b) to transfer the licence; or
 - (c) to surrender the licence.


53D. Requirements as to applications

- (1) 2 application under section 53C must —
- (a) be made in the form and in the manner approved by the CEO; and
 - (b) contain or be accompanied by any information required as indicated in the form or in material accompanying the form; and
 - (c) be accompanied by the fee prescribed by or determined under the regulations.
- (2) If the CEO requires further information to determine the application, the CEO may, by written notice given to the applicant, require the applicant to give the CEO further specified information within a specified time.
- (3) If the application does not comply with subsection (1), or further information is not provided in accordance with subsection (2), the CEO 3 must decline to deal with the application and advise the applicant accordingly.
- (4) If, under subsection (3), the CEO declines to deal with the application, the CEO does not have to perform any function under section 53E, 54, 55, 59 or 60 in relation to the application.

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 Number: 1 Author: CME WA Subject: Highlight Date: 16/01/2020 8:09:09 AM

Recommend to include a provision to combine and split licences. This will then require consequential amendments to s55(3) as that is drafted as an exclusive list.

 Number: 2 Author: CME WA Subject: Highlight Date: 25/01/2020 2:16:35 PM

The current drafting appears to create a Forrest & Forrest issue, as it requires that if the form, fee and supporting information are not all simultaneously received by the Department, the application must be declined by the CEO.

Strongly recommend removal of 'accompanied by'.

 Number: 3 Author: CME WA Subject: Highlight Date: 16/01/2020 12:27:35 PM

Change "[...] the CEO must decline to deal with the application and advise the applicant accordingly" to "[...] the CEO may decline to deal with the application, and if the CEO does decline to deal with the application, the CEO must advise the applicant accordingly."

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s. 53E

53E. Consultation in respect of application for licence or for amendment of licence

(1) In this section —

application means an application under section 53C for a licence or for the amendment of a licence;

designated area means —

- (a) a catchment area or water reserve constituted under the *Country Areas Water Supply Act 1947* or the *Metropolitan Water Supply, Sewerage, and Drainage Act 1909*; or
- (b) an Underground Water Pollution Control Area constituted under the *Metropolitan Water Supply, Sewerage, and Drainage Act 1909*; or
- (c) a watercourse or wetland to and in relation to which the *Rights in Water and Irrigation Act 1914* Part III Division 1B applies; or
- (d) a proclaimed area declared under section 26B, or irrigation district constituted under section 28, of the *Rights in Water and Irrigation Act 1914*;

Minister (Water Resources) means the Minister administering the *Water Agencies (Powers) Act 1984*.

(2) The CEO ¹ must invite comments on an application within a period specified by the CEO from —

- (a) any public authority or person which or who has, in the opinion of the CEO, a direct interest in the subject matter of the application; and
- (b) in the case of an application for a licence for the discharge of waste into a designated area or for an amendment relating to that discharge, a person nominated by the Minister (Water Resources).

(3) Subject to the publication regulations, the CEO ² must publish in a prescribed manner —

- (a) an application; and

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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020
12:35:32 PM

Change 'must' to 'may'

 Number: 2 Author: CME WA Subject: Highlight Date: 16/01/2020
12:30:23 PM

Change 'must' to 'may' due to the link back to s53D(1)(b) and potential invalidity linked to "be accompanied by" and "any information required".

(b) the information mentioned in section 53D(1)(b).

(4) When publishing the application and information under subsection (3) the CEO must —

1) invite any person who wishes to comment on the application and information to do so; and

2) specify the period within which comments can be made.

Subdivision 4 — Licence provisions

54. How applications are dealt with

(1) On an application under section 53C(1) for a licence the CEO must, subject to this Division —

(a) grant a licence subject to such of the conditions referred to in section 61 as the CEO specifies in the licence; or

(b) refuse to grant a licence.

(2) In determining whether to grant a licence and the conditions to which the licence is to be subject, the CEO —

(a) must take into account any comments made pursuant to an invitation under section 53E(2) or (4) in respect of the application; and

(b) 3) must have regard to —

(i) any prescribed standards the CEO considers relevant; and

(ii) any development approval or planning instrument the CEO considers relevant; and

(iii) whether the applicant would have, and be capable of exercising, substantial control over the carrying out of work or activity that would be authorised or dealt with by the licence if the licence were granted; and

(iv) any other matter the CEO considers relevant;

and

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Number: 1 Author: CME WA Subject: Highlight Date: 16/01/2020 12:30:59 PM

Numbering incorrect. Should be (a).

Number: 2 Author: CME WA Subject: Highlight Date: 16/01/2020 12:31:07 PM

Numbering incorrect. Should be (b).

Number: 3 Author: CME WA Subject: Highlight Date: 25/01/2020 2:17:32 PM

Change 'must' to 'may'.

The drafting of this leaves this section clearly open to legal challenge as has been the recent experience under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cwth) (successfully challenged and invalidated).

Strongly recommend re-wording.

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Division 3 Licences

s. 54A

(c) if the licence is to authorise the carrying out of a prescribed activity, must have regard to whether in the opinion of the CEO the conditions of any relevant licence in force in relation to controlled work to enable the prescribed activity to be carried out have been complied with.

(3) If under subsection (1) the CEO refuses to grant a licence, the CEO must give written notice of the refusal to the applicant.

(4) The CEO must publish in a prescribed manner notice of —

(a) the grant of a licence; or

(b) a refusal to grant a licence.

54A. Duration of licence

Unless it is surrendered or revoked, a licence continues in force for the period specified in the licence.

55. Amendment of licence

(1) On an application under section 53C(2)(a) for the amendment of a licence the CEO must, subject to this Division —

(a) amend the licence; or

(b) refuse to amend the licence.

(2) Subject to this Division, a licence may be amended by the CEO on the CEO's initiative.

1 (1) The CEO may amend a licence under subsection (1)(a) or (2) by —

(a) removing or varying any condition to which the licence is subject; or

(b) subjecting the licence to a new condition; or

(c) redescribing the boundaries or area of any premises referred to in the licence; or

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 Number: 1 Author: CME WA Subject: Highlight Date: 16/01/2020 8:21:52 AM

Recommend to include:

'combining two or more separate licences'

'splitting a licence'

'adding or removing an additional licensee'

Should also consider making this list an 'any one or more / any or all of the following' type of list.

- (d) adding, deleting, modifying or redescribing any work or activity the carrying out of which is authorised or dealt with by the licence; or
- (1) correcting in the licence —
- (i) a clerical mistake or unintentional error or omission; or
- (ii) a figure which has been miscalculated; or
- (iii) the misdescription of any person, thing or property;
- or
- (f) making an administrative change to the format of the licence which does not alter the obligations of the holder of the licence; or
- (g) adding a discharge point or emission point; or
- (h) deleting any discharge point or emission point which is no longer in use; or
- (i) amending the licence in conformity with an approved policy or prescribed standard or with an exemption conferred under this Act; or
- (j) amending the licence to give effect to a decision of the Minister under this Act (whether on an appeal or otherwise); or
- (k) extending the duration of the licence.
- (4) In determining whether to amend a licence under this section, the CEO —
- (a) if subsection (1) applies, must take into account any comments made pursuant to an invitation under section 53E(2) or (4) in respect of the application; and
- (b) ² must have regard to —
- (i) any prescribed standards the CEO considers relevant; and
- (ii) any development approval or planning instrument the CEO considers relevant; and

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Number: 1 Author: CME WA Subject: Highlight Date: 16/01/2020
12:32:57 PM

For several of these eg: (e), (f), (h), advertising should not be required.

See comment in s56(6)(a).

Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020
1:40:29 PM

Change 'must' to 'may'

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Division 3 Licences

s. 56

- (iii) any other matter the CEO considers relevant;
and
- (c) if acting under subsection (3)(d), must have regard to whether the holder of the licence would have, and be capable of exercising, substantial control over the carrying out of the work or activity in question; and
- (d) if the amendments are to authorise the carrying out of a prescribed activity, must have regard to whether the conditions of any relevant licence in force in relation to controlled work to enable the prescribed activity to be carried out have been complied with.
- (5) If under subsection (1) the CEO refuses to amend a licence, the CEO must give written notice of the refusal to the applicant.
- (6) The CEO must publish in a prescribed manner notice of —
 - (a) ¹ amendment of a licence; or
 - (b) a refusal to amend a licence.

56. Revocation or suspension of licence

- (1) The CEO may, subject to this Division, revoke or suspend a licence.
- (2) The grounds for revocation or suspension of a licence are that —
 - (a) the CEO is satisfied that there has been a contravention of any of the conditions to which the licence is subject; or
 - (b) the carrying out of work or an activity authorised or dealt with by the licence is exempted by the regulations from requiring a licence; or
 - (c) information contained in or supporting the application was false or misleading in a material respect; or
 - (d) the holder of the licence has not paid a prescribed fee in respect of the licence; or

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 Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020 2:18:03 PM

Recommend exemption from publication minor amendments under s55(3)(e), 55(3)(f), and 55(3)(h).

Note: there would be nothing to prevent the CEO from publishing these should they so want but publication of these ones appears unnecessary to be a mandatory "must" requirement.

- (e) the current business address of the holder of the licence is unknown to the CEO; or
- (f) a development approval or planning instrument required to carry out controlled work or a prescribed activity under the licence is no longer in force; or
- (g) in the opinion of the CEO, the holder of the licence no longer has, or is no longer capable of exercising, substantial control over the carrying out of work or an activity authorised or dealt with by the licence.

57. Notice and submissions in respect of proposed amendment, revocation or suspension

- (1) Before amending, revoking or suspending a licence the CEO must give the holder of the licence a written notice under this section.
- (2) The notice must —
 - (a) state details of the proposed action; and
 - (b) invite the holder to make representations to the CEO to show why the action should not be taken; and
 - (c) state the period (at least 21 days after the notice is given to the holder) within which representations may be made.
- (3) The representations must be made in writing.
- (4) Subject to and in accordance with this Division, the CEO may take the proposed action —
 - (a) at any time after the holder of the licence gives the CEO written notice that the holder does not intend to make any representations or any further representations; or
 - (b) if such notice is not given, after the end of the period stated in the notice within which representations may be made.
- (5) The CEO must have regard to any representations properly made by the holder of the licence.

58. Notice of amendment, revocation or suspension

- (1) The CEO must give the holder of a licence written notice of any amendment, revocation or suspension of the licence.
- (2) Without limiting subsection (1), notice of an amendment can be given in the form of a revised licence document.
- (3) The CEO must publish in a prescribed manner notice of any amendment, revocation or suspension of the licence.

58A. Actions taken to give effect to decision on appeal

Sections 57 and 58 do not apply to anything done by the CEO under section 110 to give effect to a decision of the Minister under section 107(2) or 109(3) on an appeal.

58B. Effect of suspension

- (1) While a licence is suspended it continues in force and is capable of being revoked or transferred.
- (2) Despite subsection (1), a licence that is suspended does not authorise the carrying out of controlled work or a prescribed activity.

59. Transfer of licence

- (1) On an application under section 53C(2)(b) for the transfer of a licence the CEO must, subject to this Division —
 - (a) transfer the licence; or
 - (b) refuse to transfer the licence.
- (2) ¹ determining whether to transfer a licence, the CEO ² must have regard to —
 - (a) any prescribed standards the CEO considers relevant; and
 - (b) any ³ development approval or planning instrument the CEO considers relevant; and
 - (c) any other matter the CEO considers relevant.

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 Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020 2:18:27 PM

Recommend remove s59(2) - the key consideration should be capability of the transferee. These considerations appear irrelevant to the assessment of whether or not to transfer and definitely should not be a must requirement.

 Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020 1:40:54 PM

Change 'must' to 'may'

 Number: 3 Author: CME WA Subject: Highlight Date: 13/01/2020 1:41:04 PM

Remove - not relevant

(3) The CEO must give the applicant written notice of the CEO's decision on the application.

(4) The CEO must publish in a prescribed manner notice of the CEO's decision on the application.

60. Surrender of licence

(1) On an application under section 53C(2)(c) to surrender a licence the CEO must, subject to this Division —

(a) accept the surrender; or

(b) refuse to accept the surrender.

(2) ¹determining whether to accept the surrender of a licence, the CEO ²must have regard to —

(a) any prescribed standards the CEO considers relevant; and

(b) any development approval or planning instrument the CEO considers relevant; and

(c) any other matter the CEO considers relevant.

(3) The CEO must give the holder of the licence written notice of the CEO's decision on the application to surrender the licence.

(4) If the CEO accepts the surrender the licence ceases to be in force when the notice under subsection (3) is given.

³A. Effect of referred proposal on decisions about licences

(1) In this section —

referred proposal means a proposal which has been referred to the Authority under section 38.

(2) For the purposes of this section, the grant, amendment or transfer of a licence (a *proposed grant, amendment or transfer*) is related to a referred proposal if the proposed grant, amendment or transfer is connected or associated with the referred proposal in such a way that the proposed grant,

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Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020 2:18:48 PM

Recommend remove s60(2) - the key consideration should be the fulfillment of compliance obligations. For example, are there any further or remaining necessary controls or remediation that needs to occur that should for example be put on to a closure notice at surrender?

Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020 1:42:27 PM

Change 'must' to 'may'

Number: 3 Author: CME WA Subject: Highlight Date: 25/01/2020 2:19:32 PM

CME supports, in principle, the intent of this proposed amendment but considers the drafting far too broad and hence impractical / unworkable. CME does not consider that this wording will work for strategic assessments and derived proposals, nor does it work for ancillary related activities such as those associated with exploration (for example, fly camps and their wastewater treatment plants), nor can it work for instances where there are related but separate (and rightly separately and independent) assets such as multi-user rail and port facilities and mine assets within the region. This drafting creates a significant legal challenge risk and must be remedied. Recommend changing this to a discretionary power that can be exercised, and explicitly confirm that this provision does not apply to decisions in respect of licences that are within the boundaries of a strategic proposal that is under assessment.

Comments from page 167 continued
on next page

(3) The CEO must give the applicant written notice of the CEO's decision on the application.

(4) The CEO must publish in a prescribed manner notice of the CEO's decision on the application.

60. Surrender of licence

(1) On an application under section 53C(2)(c) to surrender a licence the CEO must, subject to this Division —

(a) accept the surrender; or

(b) refuse to accept the surrender.

(2) In determining whether to accept the surrender of a licence, the CEO must have regard to —

(a) any prescribed standards the CEO considers relevant; and

(b) any development approval or planning instrument the CEO considers relevant; and

(c) any other matter the CEO considers relevant.

(3) The CEO must give the holder of the licence written notice of the CEO's decision on the application to surrender the licence.

(4) If the CEO accepts the surrender the licence ceases to be in force when the notice under subsection (3) is given.

60A. Effect of referred proposal on decisions about licences

(1) In this section —

referred proposal means a proposal which has been referred to the Authority under section 38.

(2) For the purposes of this section, the grant, amendment or transfer of a licence (a *proposed grant*, ⁵*amendment or* ⁴*transfer*) is related to a referred proposal if the proposed grant, amendment or transfer is connected or associated with the referred proposal in such a way that the proposed grant,

Further clarity is required as to how this links in with strategic assessments given current EPA approach is based on a 'Development Envelope', such that where mobile plant (and a prescribed area around the plant) is regulated by a licence, can the mobile plant prescribed area move outside of the Part IV development envelope?

Do no object in principle to the ability for the Minister to not make a decision on licences until broader implementation decisions have been made, however this may have unintended consequence for related, but separate actions. For example, this could preclude Australian Gas Infrastructure Group from constructing the interconnector between Pluto LNG and NWS Project until the NWS Project Extension implementation decision has been made.

The current exclusion under s60A(5) applies to a s45C application only. It is recommended to extend these exclusions to s60A(3) and 60A(4) applications when the EPA has consented under s41(5). For example, if there is an existing proposal under s38 then it would still be appropriate to allow for a proponent to seek to amend licences.

📄 Number: 4 Author: CME WA Subject: Highlight Date: 16/01/2020 8:34:31 AM

Question the need to include a transfer. For example, when asset sale occurs, it is necessary at a specific point in time to be able to simultaneously transfer a Part IV as well as a Part V. This prohibition is too broad to be workable in all scenarios.

📄 Number: 5 Author: CME WA Subject: Highlight Date: 16/01/2020 12:38:41 PM

Refer to earlier comments about amendments - must be expressly allowed to include splitting and merging.

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amendment or transfer would not need to be made if the implementation of the referred proposal did not proceed.

(3) While any decision-making authority is precluded by section 41 from making a decision in relation to a referred proposal, the CEO must not make a proposed grant, amendment or transfer that is related to the referred proposal.

(4) The CEO must not make a proposed grant, amendment or transfer that is related to a referred proposal if the proposed grant, amendment or transfer is contrary to, or otherwise than in accordance with, an implementation agreement or decision.

(5) Subsections (3) and (4) do not apply to the grant, amendment or transfer of a licence to enable the doing of minor or preliminary work to which the Authority has consented under section 41A(3).

(6) If a decision-making authority makes a decision that has the effect of preventing the implementation of a referred proposal to which a proposed grant, amendment or transfer is related, the CEO does not have to perform any function under section 54(1), 55(1) or 59(1) concerning the proposed grant, amendment or transfer while the decision-making authority's decision has effect.

(7) This section does not apply to anything done by the CEO under section 110 to give effect to a decision of the Minister under section 107(2) or 109(3) on an appeal.

60B. Relationship between licences and approved policies

(1) In considering —

(a) an application for a licence; or

(b) an application for an amendment of a licence; or

(c) an application for the transfer of a licence,

the CEO must ensure that the licence, amendment or transfer is consistent with any ¹proved policy.

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Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020 2:20:07 PM

Clarity required on what is "any approved policy" and whether this refers explicitly and only to EPPs. If not, this is quite broad and may create an issue where a licence is necessarily inconsistent, or a potential challenge opportunity is it is not demonstrated that all policies were considered.

- (2) The CEO must not amend or must refuse to grant or transfer a licence if the CEO considers that the associated effect on the environment would be inconsistent with any approved policy.
- (3) Despite subsections (1) and (2) —
- (a) if the CEO is satisfied that, as a result of environmental circumstances having changed, the environment or an environmental value of the area concerned requires a higher level of protection than would be provided by the standards required by or under any approved policy or by prescribed standards, the CEO may grant or amend a licence so as to make the licence subject to conditions which specify standards that are more stringent than those required by or under the approved policy or by prescribed standards; and
- (b) if the CEO is satisfied that, as a result of the approval under section 31(d) of a new approved policy or as a result of an approved policy as amended being confirmed under section 37, any condition to which an existing licence is subject is inconsistent with that approved policy, the CEO may amend that licence to make it consistent with that approved policy.
- (4) Subsection (3) does not authorise the imposition of a condition that is contrary to, or not in accordance with, an implementation agreement or decision.

Subdivision 5 — Conditions

61. Licence conditions

- (1) A licence may be granted or ¹nsferred subject to conditions the CEO considers to be necessary or convenient for the purposes of this Act relating to the prevention, control, abatement or mitigation of pollution or environmental harm.
- (2) Section 61A sets out some kinds of conditions that may be attached to a licence.

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Number: 1 Author: CME WA Subject: Highlight Date: 16/01/2020 4:24:56 PM

Current legislation does not contemplate conditions on licence transfers. Recommend change 'transferred' to 'amended' for consistency with section 55(3). Otherwise this would create a new tier of licence being a conditionally transferred licence and the status during the process (or any other matter) is not contemplated in the Act.

CME notes that there are broader powers to grant a licence than to amend a licence - is this intentional and if yes, why? (see s55(3) vs 61(1)).

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- (3) The regulations may prescribe further kinds of conditions that may be attached to a licence.
- (4) Nothing in section 61A or regulations made under subsection (3) prevents other conditions from being attached to a licence.
- (5) Without limiting subsection (3), the regulations may prescribe conditions to which every licence, or every licence of a kind specified in the regulations, is subject unless otherwise specified in the licence.
- (6) Without limiting subsections (1) to (5), a licence may be subject to a condition that the holder of the licence comply with a requirement to pay a levy imposed under the *Environmental Protection (Landfill) Levy Act 1998* or the *Waste Avoidance and Resource Recovery Levy Act 2007* in relation to waste received at premises to which the licence relates.
- (7) Without limiting subsections (1) to (5), a licence may be subject to a condition that the holder of the licence comply with a requirement to pay a levy imposed under Part VIIB Division 5 if the licence authorises a monitored activity.
- (8) Except as provided in section 60B a condition must not be inconsistent with an approved policy or a prescribed standard.

61A. Some kinds of conditions

- (1) In this section —
specified means specified by the CEO in the licence concerned.
- (2) The following list sets out things that the holder of a licence can be required to do (at the expense of the holder) under conditions attached to the licence —
 - (a) design, construct or operate any facilities or plant in accordance with specified criteria;
 - (b) install or operate any equipment for preventing, controlling, abating or monitoring pollution or

environmental harm in accordance with specified criteria;

(c) take specified measures for the purpose of minimising the likelihood of pollution or environmental harm;

(d) take specified measures to prevent, control, abate or mitigate any emission or potential emission resulting from an activity authorised by the licence to be carried out;

(e) meet specified criteria, or comply with specified limits, as to the characteristics, volume, rate, duration and effects of emissions;

(f) meet specified ambient concentration limits in specified premises or places;

(g) comply with requirements set by management plans, prescribed standards, guidelines published on the Department's website or other specified programmes;

(h) monitor operations;

(i) conduct analysis of monitoring data;

(j) provide information on the nature and quantity of wastes and on materials leading to the generation of those wastes;

(k) dispose of waste in a specified manner;

(l) if practicable —

(i) reuse waste wholly or in part; or

(ii) make waste available for reuse by another person;

(m) investigate options for measures for preventing, controlling or abating pollution or environmental harm;

(n) conduct environmental risk assessment studies;

(o) provide reports on monitoring data, and analysis of it, to the CEO;

(p) provide reports on audits and studies of specified kinds to the CEO;

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- (q) provide audit compliance reports to the CEO;
- (r) prepare, implement and adhere to environmental management ¹systems, waste management systems, safety management systems, environmental management plans and environmental improvement plans;
- (s) have something required to be done under a condition done by —
- (i) a person of a class approved by the CEO; or
- (ii) a laboratory registered by the National Association of Testing Authorities;
- (t) do something required to be done under a condition —
- (i) within a specified period or before a specified date; or
- (ii) in a specified form or manner.
- (3) ²The holder of a licence who, being required under a condition attached to the licence to provide a report on monitoring data, or analysis of it, to the CEO —
- (a) fails to do so within the specified period or before the specified date; or
- (b) fails to do so in the specified form or manner,
- commits an offence.
- (4) Without limiting subsection (2), a condition referred to in subsection (2)(h) can require the holder of a licence to carry out a specified monitoring programme for the purpose of supplying the CEO with information relating —
- (a) to the characteristics and volume of any waste to which the licence relates that is being held or stored; or
- (b) to the characteristics, volume and effects of any pollutant being or likely to be emitted into the environment from premises where an activity is being carried out as authorised by the licence, and to the characteristics of the environment.

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 Number: 1 Author: CME WA Subject: Highlight Date: 17/01/2020 10:58:59 AM

The presence / absence of a management 'system' is process-focussed not environmental outcome-focussed. It can also be difficult to audit. The focus of conditions should be environmental outcomes. Recommend remove 'environmental management systems'.

 Number: 2 Author: CME WA Subject: Highlight Date: 25/01/2020 2:21:42 PM

Recommend remove s61A(3) as this constitutes a breach of licence condition and is therefore captured under s62 so is unnecessary. It would also appear to be poor drafting practice to introduce an entirely new offence provision in to a section of the EP Act that is not the section where all the related offences are contained.

62. Contravening licence conditions

The holder of a licence who contravenes a condition to which the licence is subject commits an offence.

63. 1ffences as to conditions by persons other than holder of licence

(1) In this section —

2ensed action means the carrying out of work or an activity authorised or dealt with by a licence (the *licence*).

(2) This subsection applies to an act or omission if —

(a) it occurs in the carrying out of work or an activity constituting or relating to a licensed action; and

(b) it is an act or omission of a person other than the holder of the licence; and

(c) it would, if it had been an act or omission of the holder of the licence, have contravened a condition to which the licence is subject.

(3) If subsection (2) applies to an act or omission the person mentioned in subsection (2)(b) commits an offence.

(4) If it is proved that subsection (2) applies to an act or omission, the holder of the licence is to be taken for the purposes of section 62 to have contravened the condition mentioned in subsection (2)(c) whether or not the person mentioned in subsection (2)(b) is charged with an offence under subsection (3) in relation to the act or omission.

Subdivision 6 — Miscellaneous

64. CEO must keep and publish records

(1) The CEO must keep a record of —

(a) such particulars of the following as are prescribed —

(i) applications for licences, amendments of licences and transfers of licences;

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Number: 1 Author: CME WA Subject: Highlight Date: 25/01/2020 2:22:27 PM

This section is very broad. There also appears to be an issue here for the person(s) even if they did not know and could not reasonably have known etc. In such instances, they would have committed an offence but may be able to argue for a defence against the offence however it should not be an offence in the first place.

This amendment makes sense in the case of contractors or related entities carrying out activities on behalf of the licence holder but extending this personal liability to all employees is not reasonable, particularly as acts of employees would ordinarily be considered to be the act of the holder.

Number: 2 Author: CME WA Subject: Highlight Date: 16/01/2020 4:43:02 PM

Why is it necessary to introduce a new term 'licensed action' just for this one section on offences?

This seems to unnecessarily complicate the drafting.

- (ii) licences, amendments of licences and transfers of licences;
- (iii) the surrender, suspension and revocation of licences;
- and
- (b) such other information and documents relating to licences as are prescribed.
- (2) The CEO must publish in a prescribed manner prescribed particulars of the record.

~~Division 3—Prescribed premises, works approvals and licences~~

~~[Heading inserted: No. 54 of 2003 s. 39.]~~

~~52. Changing premises to become prescribed premises requires approval~~


~~The occupier of any premises who carries out any work on or in relation to the premises which causes the premises to become, or to become capable of being, prescribed premises commits an offence unless he does so in accordance with a works approval.~~

~~[Section 52 amended: No. 54 of 2003 s. 70.]~~

~~53. Prescribed premises, restrictions as to changes to etc.~~

- ~~(1) Subject to this Act, the occupier of any prescribed premises who, if to do so may cause an emission, or alter the nature or volume of the waste, noise, odour or electromagnetic radiation emitted, from the prescribed premises—~~
 - ~~(a) alters the method of operation of any trade, or of any process used in any trade, carried on at the prescribed premises; or~~

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 Number: 1 Author: CME WA Subject: Highlight Date: 16/01/2020 4:50:35 PM

Note: in re-drafting, when the deletions following are all made, this will need to become 'Division 4 Notices, orders and directions'

- ~~_____ (b) constructs, installs or alters any equipment on the prescribed premises for _____~~
- ~~_____ (i) the storage, handling, transport or treatment of waste prior to, and for the purpose of, the discharge of waste; or~~
- ~~_____ (ii) the control of noise, odour or electromagnetic radiation prior to, and for the purpose of, the emission or transmission of noise, odour or electromagnetic radiation,~~
- ~~_____ into the environment; or~~
- ~~_____ (c) alters the type of materials or products used or produced in any trade carried on at the prescribed premises; or~~
- ~~_____ (d) alters the type of fuel used in any fuel burning equipment or industrial plant in any trade carried on at the prescribed premises; or~~
- ~~_____ (e) installs, alters or replaces any fuel burning equipment or industrial plant on the prescribed premises or carries out any work on the prescribed premises which is the beginning of, or any subsequent step in, that installation, alteration, replacement or carrying out,~~
- ~~_____ commits an offence unless he does so _____~~
- ~~_____ (f) in accordance with _____~~
- ~~_____ (i) a works approval; or~~
- ~~_____ (ii) a licence; or~~
- ~~_____ (iii) a requirement contained in a closure notice or an environmental protection notice,~~
- ~~_____ as the case requires; or~~
- ~~_____ (g) only in the course of and for the purpose of general maintenance required to maintain the efficient operation of any pollution control equipment or procedure.~~

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s. 64

~~(2) Subject to this Act, the occupier of any prescribed premises who in or on the prescribed premises —~~

~~(a) carries out any work which is the beginning of, or any subsequent step in, any work referred to in subsection (1)(a) to (e) if the completion of the alteration, construction, installation or replacement concerned might cause an emission, or alter the nature or volume of the waste, noise, odour or electromagnetic radiation emitted, from the prescribed premises; or~~

~~(b) constructs, relocates or alters any discharge or emission pipe, channel or chimney through which waste is or may be discharged into the environment from the prescribed premises or carries out any work which is the beginning of, or any subsequent step in, any such construction, relocation or alteration,~~

~~commits an offence unless he does so —~~

~~(c) in accordance with —~~

~~(i) a works approval; or~~

~~(ii) a licence; or~~

~~(iii) a requirement contained in a closure notice or an environmental protection notice,~~

~~as the case requires; or~~

~~(d) only in the course of and for the purpose of general maintenance required to maintain the efficient operation of any pollution control equipment or procedure.~~

~~[Section 53 amended: No. 54 of 2003 s. 40 and 71.]~~

~~54. Works approvals, applying for, granting, refusing etc.~~

- ~~(1) An application for a works approval shall be —~~
- ~~(a) made in the form and in the manner approved by the CEO; and~~
 - ~~(b) accompanied by such fee as is prescribed by or determined under the regulations; and~~
 - ~~(c) supported by such plans, specifications and other documents and information, including a summary thereof, as the CEO requires.~~
- ~~(2) On receiving an application made under subsection (1), the CEO shall —~~
- ~~(a) if that application does not comply with that subsection, decline to deal with that application and advise the applicant accordingly; or~~
 - ~~(b) if that application complies with that subsection, advise the applicant that his application has been received and seek comments thereon from any public authority or person which or who has, in the opinion of the CEO, a direct interest in the subject matter of that application.~~
- ~~(2a) As well as seeking comments under subsection (2)(b) the CEO is to advertise the application in the prescribed manner, inviting any person who wishes to comment on it to do so within such period as is specified in the advertisement.~~
- ~~(3) Subject to subsections (4) and (5), the CEO shall, after having taken into account any comments received from any public authority or person from which or whom comments were sought under subsection (2)(b) or (2a) and subject to section 60 —~~
- ~~(a) grant a works approval subject to such of the conditions referred to in section 62 as the CEO specifies in the works approval; or~~
 - ~~(b) refuse to grant a works approval.~~
- ~~(3a) The CEO is to give the applicant written notice of the refusal to grant a works approval.~~

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s. 55

- ~~(4) If an application for a works approval made under subsection (1) is related to a proposal which has been referred to the Authority under section 38, the CEO shall not perform any duty imposed on him by subsection (3) —~~
- ~~(a) while any decision-making authority is precluded by section 41 from making any decision which could have the effect of causing or allowing that proposal to be implemented; or~~
- ~~(b) contrary to, or otherwise than in accordance with, an implementation agreement or decision.~~
- ~~(5A) Subsection (4) does not apply if the application is for a works approval for the purpose of doing minor or preliminary work to which the Authority has consented under section 41A(3).~~
- ~~(5) If a decision-making authority makes a decision that has the effect of preventing the implementation of a proposal to which an application for a works approval made under subsection (1) is related, the CEO does not have to perform any duty imposed under subsection (3) while that decision has effect.~~
- ~~[Section 54 amended: No. 54 of 2003 s. 72 and 140(2); No. 40 of 2010 s. 16.]~~

55. Contravening conditions of works approvals

- ~~(1) The occupier of any premises to which a works approval relates (in this section called the *relevant premises*) who contravenes any condition to which the works approval, or a suspension of the works approval, is subject commits an offence.~~
- ~~(2) If —~~
- ~~(a) the relevant premises are shared by a corporation and a subsidiary or subsidiaries of the corporation; and~~
- ~~(b) the corporation or a subsidiary referred to in paragraph (a) is an occupier of the relevant premises; and~~
- ~~(c) a condition to which the works approval relating to the relevant premises is for the time being subject is contravened on the relevant premises;~~

~~the occupier referred to in paragraph (b) is deemed to have caused the contravention referred to in paragraph (c) unless the contrary is proved.~~

~~(3) In subsection (2) —~~

~~*corporation* has the meaning given by the *Corporations Act 2001* of the Commonwealth;~~

~~*subsidiary* has the meaning given by the *Corporations Act 2001* of the Commonwealth.~~

~~[Section 55 amended: No. 10 of 2001 s. 71; No. 54 of 2003 s. 73.]~~

56. ~~Occupiers of prescribed premises to be licensed for emissions etc.~~

~~(1) Subject to this Act, the occupier of any prescribed premises who —~~

~~(a) causes or increases, or permits to be caused or increased, an emission; or~~

~~(b) alters or permits to be altered the nature of the waste, noise, odour or electromagnetic radiation emitted,~~

~~from the prescribed premises commits an offence unless he is the holder of a licence issued in respect of the prescribed premises and so causes, increases, permits or alters in accordance with any conditions to which that licence is subject.~~

~~(2) Subsection (1) does not apply if the emission is caused, increased or altered —~~

~~(a) as a result of anything done in accordance with a works approval; and~~

~~(b) while the works approval is in force.~~

~~[Section 56 amended: No. 54 of 2003 s. 41 and 74.]~~

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s. 57

~~57. — Licences, applying for, granting, refusing etc.~~

~~(1) — An application for a licence shall be —~~

~~(a) — made in the form and in the manner approved by the CEO; and~~

~~(b) — accompanied by such fee as is prescribed by or determined under the regulations; and~~

~~(c) — supported by such plans, specifications and other documents and information, including a summary thereof, as the CEO requires.~~

~~(2) — On receiving an application made under subsection (1), the CEO shall —~~

~~(a) — if that application —~~

~~(i) — does not comply with that subsection; or~~

~~(ii) — relates to a matter in respect of which a works approval —~~

~~(A) — has been granted and, in the opinion of the CEO, the works concerned have not been completed satisfactorily in accordance with the conditions to which the works approval is subject (to the extent to which that completion and those conditions are relevant to that application); or~~

~~(B) — is required to be, and has not been, granted and the works concerned have not been completed,~~

~~decline to deal with that application and advise the applicant accordingly; or~~

- ~~— (b) if that application complies with that subsection and does not relate to a matter referred to in paragraph (a)(ii), advise the applicant that that application has been received and seek comments thereon from —~~
- ~~— (i) any public authority or person which or who in the opinion of the CEO has a direct interest in the subject matter of that application; and~~
- ~~— (ii) in the case of an application for a licence for the discharge of waste into a designated area, a person nominated by the Minister (Water Resources);~~
- ~~— (2a) As well as seeking comments under subsection (2)(b) the CEO is to advertise the application in the prescribed manner, inviting any person who wishes to comment on it to do so within such period as is specified in the advertisement.~~
- ~~— (3) The CEO shall, after having taken into account any comments received from any public authority or person from which or whom comments were sought under subsection (2)(b) or (2a) and subject to section 60 —~~
- ~~— (a) in the case of an application for a licence made under subsection (1) relating to a matter in respect of which a works approval has not been granted and subject to subsection (4) —~~
- ~~— (i) grant a licence subject to such of the conditions referred to in section 62 as the CEO specifies in the licence; or~~
- ~~— (ii) refuse to grant the licence;~~
- ~~— or~~
- ~~— (b) in the case of an application for a licence made under subsection (1) relating to a matter in respect of which a works approval has been granted —~~
- ~~— (i) if, in the opinion of the CEO, the works concerned have been completed in accordance~~

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- ~~with the conditions to which the works approval is subject, grant the licence subject to such of the conditions referred to in section 62 as are not inconsistent with any conditions to which the works approval is for the time being subject and as are specified by the CEO in the licence; or~~
- ~~— (ii) — refuse to grant the licence.~~
- ~~— (3a) — The CEO is to give the applicant written notice of the refusal to grant a licence.~~
- ~~— (4) — If an application for a licence made under subsection (1) is related to a proposal which has been referred to the Authority under section 38, the CEO shall not perform the duty imposed on him by subsection (3) —~~
- ~~— (a) — while any decision-making authority is precluded by section 41 from making any decision which could have the effect of causing or allowing that proposal to be implemented; or~~
- ~~— (b) — contrary to, or otherwise than in accordance with, an implementation agreement or decision.~~
- ~~(4AA) — Subsection (4) does not apply if the application is for a licence for the purpose of doing minor or preliminary work to which the Authority has consented under section 41A(3).~~
- ~~— (4a) — If a decision-making authority makes a decision that has the effect of preventing the implementation of a proposal to which an application for a licence made under subsection (1) is related, the CEO does not have to perform any duty imposed under subsection (3) while that decision has effect.~~
- ~~— (5) — In this section —~~
- ~~**designated area** means —~~
- ~~— (a) — catchment area or water reserve constituted under the *Country Areas Water Supply Act 1947* or the *Metropolitan Water Supply, Sewerage, and Drainage Act 1909*; or~~

~~(b) Underground Water Pollution Control Area constituted under the Metropolitan Water Supply, Sewerage, and Drainage Act 1909; or~~

~~(c) watercourse or wetland to and in relation to which Division 1B of Part III of the Rights in Water and Irrigation Act 1914 applies; or~~

~~(d) proclaimed area declared under section 26B, or irrigation district constituted under section 28, of the Rights in Water and Irrigation Act 1914;~~

~~**Minister (Water Resources)** means the Minister administering the Water Agencies (Powers) Act 1984.~~

~~[Section 57 amended: No. 73 of 1995 s. 188; No. 49 of 2000 s. 84; No. 54 of 2003 s. 75 and 140(2); No. 38 of 2007 s. 194; No. 40 of 2010 s. 17; No. 25 of 2012 s. 211.]~~

58. Contravening licence conditions

~~(1) A holder of a licence who contravenes a condition to which the licence is subject commits an offence.~~

~~(2) If a person contravenes on premises in respect of which a licence is in force a condition to which the licence is subject, the occupier of those premises is himself deemed to have contravened that condition whether or not the person acted contrary to the instructions of that occupier in contravening that condition.~~

~~(3) If~~

~~(a) premises are shared by a corporation and a subsidiary or subsidiaries of the corporation; and~~

~~(b) the corporation or a subsidiary referred to in paragraph (a) is a licensee in respect of the premises referred to in that paragraph; and~~

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~~— (c) a condition to which the licence of the licensee referred to in paragraph (b) is subject is contravened on the premises referred to in paragraph (a);~~

~~— the licensee referred to in paragraph (b) is deemed to have caused the contravention referred to in paragraph (c) unless the contrary is proved.~~

~~— (4) In subsection (3) —~~

~~— **corporation** has the meaning given by the *Corporations Act 2001* of the Commonwealth;~~

~~— **subsidiary** has the meaning given by the *Corporations Act 2001* of the Commonwealth.~~

~~— [Section 58 amended: No. 10 of 2001 s. 72; No. 54 of 2003 s. 76.]~~

59. Amending works approval or licence

~~— (1) The CEO may amend a works approval or licence by —~~

~~— (a) removing or varying any condition to which the works approval or licence is subject; or~~

~~— (b) subjecting the works approval or licence to a new condition; or~~

~~— (c) redesccribing the boundaries or area of the premises to which the works approval or licence applies; or~~

~~— (d) redesccribing the purpose for which the premises to which the works approval or licence applies are used; or~~

~~— (e) correcting in the works approval or licence —~~

~~— (i) a clerical mistake or unintentional error or omission; or~~

~~— (ii) a figure which has been miscalculated; or~~

~~— (iii) the misdescription of any person, thing or property;~~

~~— or~~

- ~~— (f) making an administrative change to the format of the works approval or licence which does not alter the obligations of the occupier of the premises to which the works approval or licence relates; or~~
- ~~— (g) adding a discharge point or emission point; or~~
- ~~— (h) deleting any discharge point or emission point which is no longer in use; or~~
- ~~— (i) amending the works approval or licence in conformity with an approved policy or prescribed standard or with an exemption conferred under this Act; or~~
- ~~— (j) amending the works approval or licence to give effect to a decision of the Minister under this Act (whether on an appeal or otherwise); or~~
- ~~— (k) extending the duration of the works approval or licence.~~
- ~~— (2) A works approval or licence may be amended on application by the holder of the works approval or licence or on the initiative of the CEO.~~
- ~~— [Section 59 inserted: No. 54 of 2003 s. 77.]~~

59A. — Revoking or suspending works approval or licence

- ~~— (1) The CEO may revoke or suspend a works approval or licence.~~
- ~~— (2) The grounds for revocation or suspension of a works approval or licence are that —~~
 - ~~— (a) the CEO is satisfied that there has been a breach of any of the conditions —~~
 - ~~— (i) to which the works approval or licence is subject; or~~
 - ~~— (ii) to which a works approval granted to the licensee was at the time of that breach subject;~~
 - ~~— or~~
 - ~~— (b) the premises to which the licence relates are exempted by the regulations from requiring a licence; or~~

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- ~~— (c) information contained in or supporting the application was false or misleading in a material respect; or~~
- ~~— (d) the current business address of the holder of the works approval or licence is unknown; or~~
- ~~— (e) the holder of the works approval or licence has applied to the CEO to surrender the works approval or licence.~~

~~— [Section 59A inserted: No. 54 of 2003 s. 77.]~~

59B. Procedure for amending, revoking or suspending works approval or licence

- ~~— (1) An application for an amendment to a works approval or licence or to surrender a works approval or licence is to —~~
 - ~~— (a) be made in the manner and form approved by the CEO; and~~
 - ~~— (b) be accompanied by the fee prescribed by or determined under the regulations; and~~
 - ~~— (c) be supported by any plans, specifications and other documents and information required by the CEO and include a summary of that supporting documentation and information.~~
- ~~— (2) Before amending, revoking or suspending a works approval or licence the CEO is to give the holder of the works approval or licence a written notice under this section.~~
- ~~— (3) The notice is to —~~
 - ~~— (a) state details of the proposed action; and~~
 - ~~— (b) invite the holder to make representations to the CEO to show why the action should not be taken; and~~
 - ~~— (c) state the period (at least 21 days after the notice is given to the holder) within which representations may be made.~~
- ~~— (4) The representations must be made in writing.~~

- ~~—(5) Subject to subsection (7), the CEO may take the proposed action—~~
- ~~—(a) at any time after the holder of the works approval or licence gives the CEO written notice that the holder does not intend to make any representations or any further representations; or~~
- ~~—(b) if such notice is not given, after the end of the period stated in the notice within which representations may be made.~~
- ~~—(6) The CEO is to consider any representations properly made by the holder of the works approval or licence.~~
- ~~—(7) If the proposed amendment, revocation or suspension is related to a proposal which has been referred to the Authority under section 38, the CEO is not to so amend, revoke or suspend—~~
- ~~—(a) while any decision making authority is precluded by section 41 from making any decision which could have the effect of causing or allowing that proposal to be implemented; or~~
- ~~—(b) contrary to, or otherwise than in accordance with, an implementation agreement or decision.~~
- ~~—(8) If a decision making authority makes a decision that has the effect of preventing the implementation of a proposal to which an amendment proposed under this section is related, the CEO does not have to make a decision on the amendment while the decision making authority's decision has effect.~~
- ~~—(9) The CEO is to give the holder of the works approval or licence written notice of any amendment, revocation or suspension of the works approval or licence.~~
- ~~—(10) Without limiting subsection (9), notice of an amendment can be given in the form of a revised works approval or licence document.~~
- ~~—[Section 59B inserted: No. 54 of 2003 s. 77.]~~

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~~60. Relationship between works approvals or licences and approved policies~~

- ~~— (1) The CEO shall in considering an amendment of a licence or an application for a works approval or a licence or for the transfer thereof ensure that the works approval or licence or amendment or transfer thereof is consistent with any approved policy.~~
- ~~— (2) The CEO shall not amend or shall refuse to grant or transfer a works approval or licence if he considers that the emission concerned would be inconsistent with any approved policy.~~
- ~~— (3) Despite anything in this section —~~
 - ~~— (a) if the CEO is satisfied that, as a result of environmental circumstances having changed, the environment or an environmental value of the area concerned requires a higher level of protection than would be provided by the standards required by or under any approved policy or by prescribed standards, the CEO may grant or amend a works approval or licence so as to make the works approval or licence subject to conditions which specify standards that are more stringent than those required by or under the approved policy or by prescribed standards;~~
 - ~~— (b) if the CEO is satisfied that, as a result of the approval under section 31(d) of a new approved policy or as a result of an approved policy as amended being confirmed under section 37, any condition to which an existing works approval or licence is subject is inconsistent with that approved policy, the CEO may amend that works approval or licence to make it consistent with that approved policy.~~

~~— [Section 60 amended: No. 54 of 2003 s. 42, 78 and 140(2).]~~

~~61. Duty of persons becoming occupiers of prescribed premises~~

- ~~— (1) This section applies when a person becomes the occupier (the *new occupier*) of any prescribed premises (the *premises*).~~

- ~~—(2) In this section, the day on which the new occupier becomes the occupier of the premises is referred to as the **relevant day**.~~
- ~~—(3) If a works approval or licence (the **existing authorisation**) is in force in respect of the premises on the relevant day, the new occupier must comply with the conditions to which the existing authorisation is subject and must, within 30 days after the relevant day, apply—~~
- ~~—(a) under section 64 for the transfer of the existing authorisation to the new occupier; or~~
- ~~—(b) under section 54 or 57 for a works approval or licence.~~
- ~~—(4) If subsection (3) is not complied with, the new occupier commits an offence.~~
- ~~—(5) If the new occupier complies with subsection (3) in respect of the premises, the new occupier is to be regarded as having been the holder of the existing authorisation—~~
- ~~—(a) during the period before applying for the transfer of the existing authorisation or for a works approval or licence, as the case may be; and~~
- ~~—(b) while that application is pending.~~
- ~~—(6) This subsection applies if a works approval or licence is not in force in respect of the premises on the relevant day but, within 30 days after the relevant day, the new occupier applies under section 54 or 57 for a works approval or licence in respect of the premises.~~
- ~~—(7) If subsection (6) applies, the new occupier does not commit any offence under section 53 or 56 in respect of the emission of a pollutant from the premises without a works approval or licence while the application under section 54 or 57 is pending.~~
- ~~—[Section 61 inserted: No. 54 of 2003 s. 79.]~~

62. Works approval and licence conditions

- ~~—(1) A works approval or licence may be granted subject to such conditions as the CEO considers to be necessary or convenient~~

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~~for the purposes of this Act relating to the prevention, control, abatement or mitigation of pollution or environmental harm.~~

~~(2) Section 62A sets out some kinds of conditions that may be attached to a works approval or licence and further kinds of conditions may be prescribed, but nothing in that section or the regulations prevents other conditions from being attached.~~

~~(3) Subject to section 60 a condition is not to be inconsistent with an approved policy or a prescribed standard.~~

~~[Section 62 inserted: No. 54 of 2003 s. 79.]~~

62A. Some kinds of conditions

~~(1) The following list sets out things that the occupier of premises to which a works approval or licence relates can be required to do (at the expense of the occupier) under conditions attached to the works approval or licence —~~

~~(a) design, construct or operate any facilities or plant in accordance with specified criteria;~~

~~(b) install or operate any equipment for preventing, controlling, abating or monitoring pollution or environmental harm in accordance with specified criteria;~~

~~(c) take specified measures for the purpose of minimising the likelihood of pollution or environmental harm;~~

~~(d) meet specified criteria or comply with specified limits as to the characteristics, volume and effects of, emissions;~~

~~(e) meet specified ambient concentration limits in specified premises or places;~~

~~(f) comply with requirements set by management plans or other specified programmes;~~

~~(g) monitor operations;~~

~~(h) conduct analysis of monitoring data;~~

~~(i) provide information on the nature and quantity of wastes and on materials leading to the generation of those wastes;~~

- ~~— (j) dispose of waste in a specified manner;~~
- ~~— (k) if practicable —~~
- ~~— (i) reuse waste wholly or in part; or~~
- ~~— (ii) make waste available for reuse by another person;~~
- ~~— (l) investigate options for measures for preventing, controlling or abating pollution or environmental harm;~~
- ~~— (m) conduct environmental risk assessment studies;~~
- ~~— (n) provide reports on monitoring data, and analysis of it, to the CEO;~~
- ~~— (o) provide reports on audits and studies of specified kinds to the CEO;~~
- ~~— (p) provide audit compliance reports to the CEO;~~
- ~~— (q) prepare, implement and adhere to environmental management systems, waste management systems, safety management systems, environmental management plans and environmental improvement plans;~~
- ~~— (r) have something required to be done under a condition done by —~~
 - ~~— (i) a person of a class approved by the CEO; or~~
 - ~~— (ii) a laboratory registered by the National Association of Testing Authorities;~~
- ~~— (s) do something required to be done under a condition —~~
 - ~~— (i) within a specified period or before a specified date; or~~
 - ~~— (ii) in a specified form or manner.~~
- ~~— (2) An occupier of premises who, being required under a condition attached to a works approval or licence to provide a report on monitoring data, or analysis of it, to the CEO —~~
 - ~~— (a) fails to do so within the specified period or before the specified date; or~~

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~~— (b) fails to do so in the specified form or manner,~~

~~— commits an offence.~~

~~— (3) Without limiting subsection (1) paragraph (g), a condition referred to in that paragraph can require an occupier of premises to carry out a specified monitoring programme for the purpose of supplying the CEO with information relating —~~

~~— (a) to the characteristics and volume of any waste held or stored on those premises; or~~

~~— (b) to the characteristics, volume and effects of any pollutant being or to be emitted,~~

~~— from those premises into the environment, and to the characteristics of the environment.~~

~~— (4) In this section —~~

~~— *specified* means specified by the CEO in the works approval or licence concerned.~~

~~— [Section 62A inserted: No. 54 of 2003 s. 79.]~~

~~63. Duration of works approvals and licences~~

~~— Subject to this Act, a works approval or licence shall continue in force for such period as is specified in the works approval or licence.~~

~~63A. CEO to keep and publish record of works approvals and licences~~

~~— (1) The CEO is to keep a record of such particulars of —~~

~~— (a) works approvals and licences; and~~

~~— (b) applications for works approvals and licences; and~~

~~— (c) applications for renewal of works approvals and licences; and~~

~~— (d) transfers of works approvals and licences,~~

~~— as are prescribed.~~

~~(2) The CEO is to publish from time to time in a prescribed manner prescribed particulars of the record.~~

~~[Section 63A inserted: No. 54 of 2003 s. 43.]~~

64. Transfer of works approvals and licences

~~(1) An application for the transfer of a works approval or licence shall be —~~

~~(a) made by the person to whom it is sought to transfer the works approval or licence in the form and in the manner approved by the CEO; and~~

~~(b) accompanied by the fee prescribed by or determined under the regulations; and~~

~~(c) supported by such plans, specifications and other documents and information, including a summary thereof, as the CEO requires.~~

~~(2) On receiving an application made under subsection (1), the CEO shall, subject to section 60 —~~

~~(a) transfer the works approval or licence concerned to the applicant subject to such of the conditions referred to in section 62 as the CEO specifies in that works approval or licence; or~~

~~(b) refuse to transfer the works approval or licence concerned to the applicant.~~

~~[Section 64 amended: No. 54 of 2003 s. 80 and 140(2).]~~


Division 4 — Notices, orders and directions

~~[Heading inserted: No. 54 of 2003 s. 44.]~~

64A. CEO to keep and publish record of notices

(1) The CEO is to keep a record of such particulars of notices given under this Division as are prescribed.

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- (2) The CEO is to publish from time to time in a prescribed manner prescribed particulars of the record.

[Section 64A inserted: No. 54 of 2003 s. 44.]


65. Environmental protection notices, issue and effect of

- (1) If the CEO suspects on reasonable grounds that —
- (a) there is, or is likely to be, an emission from any premises, and the emission —
 - (i) does not comply with or would not if it were emitted comply with a standard required by or under an approved policy or a prescribed standard; or
 - (ii) has caused or is likely to cause pollution;
 - or
 - (b) a person is doing, or is likely to do, an act in contravention of section 50A or 50B on any premises; or
 - (c) an activity on premises does not comply with a standard required by or under an approved policy or a prescribed standard,

the CEO may cause to be given to the owner or the occupier, or both the owner and the occupier, of the premises a notice (an **environmental protection notice**) in respect of the premises.

- (1a) An environmental protection notice may require a person bound by it to do any one or more of the following —
- (a) investigate the extent and nature of —
 - (i) the emission and its consequences; or
 - (ii) the pollution and its consequences; or
 - (iii) the environmental harm and its consequences;
 - (b) prepare and implement a plan for the prevention, control or abatement of —
 - (i) the emission; or
 - (ii) the pollution; or


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- (iii) the environmental harm;
 - (c) take such measures as the CEO considers necessary to —
 - (i) prevent, control or abate the emission; or
 - (ii) prevent, control or abate the pollution; or
 - (iii) prevent, control or abate the environmental harm; or
 - (iv) comply with the standard;
 - (d) ensure that the amount of waste, noise, odour or electromagnetic radiation emitted from the premises, or the concentration of that waste, noise, odour or electromagnetic radiation when measured at a point specified in the environmental protection notice, does not exceed the limit specified in the notice;
 - (e) monitor the effectiveness of actions taken under paragraph (a), (b), (c) or (d);
 - (f) report to the CEO on any action taken under paragraph (a), (b), (c), (d) or (e) and its outcome.
- (1b) An environmental protection notice may require a person bound by it to do the matters referred to in subsection (1a) in accordance with an approval, direction or requirement of a type specified in the notice by a person specified in the notice.
- (2) An environmental protection notice —
- (a) is to specify —
 - (i) the name and address of the person on whom it is served; and
 - (ii) the reason for which it is served; and
 - (iii) a description of the relevant premises and the location of the premises sufficient to identify both; and
 - (iv) the period within which the investigation is to be completed, the plan is to be prepared and the measures are to be taken; and


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- (v) the frequency of information to be reported to the CEO;
- and
- (b) is to describe —
 - (i) the form of the investigation to be undertaken; and
 - (ii) the form of the plan to be prepared and implemented; and
 - (iii) the measures to be taken; and
 - (iv) the form of the monitoring to be undertaken; and
 - (v) the content and form of information to be reported to the CEO.
- (3) An environmental protection notice —
 - (a) while it subsists, binds each owner or occupier to whom it is given; and
 - (b) while it remains registered under section 66, binds each successive owner or occupier of the land to which the environmental protection notice relates.
- (4) The CEO may by notice in writing served on every person bound by an environmental protection notice revoke the environmental protection notice or, subject to subsections (6) and (7), amend it —
 - (a) by extending the period within which a requirement contained in the environmental protection notice is to be complied with if the CEO is satisfied that the circumstances of the case justify such an extension; or
 - (b) by revoking or amending any requirement contained in the environmental protection notice.
- (4a) A person who —
 - (a) is bound by an environmental protection notice; and

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- (b) intentionally or with criminal negligence does not comply with a requirement contained in the environmental protection notice,
- commits an offence.
- (5) A person who is bound by an environmental protection notice and who does not comply with a requirement contained in the notice commits an offence.
- (5a) A person charged with committing an offence against subsection (4a) may be convicted of an offence against subsection (5) which is established by the evidence.
- (6) The CEO shall, before exercising in respect of a person the power of amendment conferred on **2m** by subsection (4), afford the person a reasonable opportunity to show cause in writing why that power should not be exercised in respect of **3m**.
- (7) An opportunity is not a reasonable opportunity within the meaning of subsection (6) unless the relevant person is informed in writing of **4s** right to show cause under that subsection not less than 21 days before the day on which the CEO exercises the power in question.
- (8) In this section —
specified means specified in the environmental protection notice concerned.

[Section 65 amended: No. 14 of 1998 s. 7; No. 54 of 2003 s. 45(1)-(3), 46 and 140(2).]

66. Environmental protection notices, registration of etc. on land titles

- (1) When an environmental protection notice is given under section 65, the CEO shall deliver a copy of the notice to the Western Australian Planning Commission and —
- (a) in the case of an environmental protection notice relating to land which is under the operation of the *Transfer of*

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9:42:11 AM

Change 'him' to 'him / her' or 'them'

 Number: 3 Author: CME WA Subject: Highlight Date: 16/01/2020
4:58:02 PM

Change 'him' to 'him / her' or 'them'

 Number: 4 Author: CME WA Subject: Highlight Date: 16/01/2020
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Change to 'their' or 'his / her' or 'their'

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Land Act 1893 or *Land Administration Act 1997*, to the Registrar of Titles; or

- (b) in the case of an environmental protection notice relating to land which is alienated from the Crown but which is not under the operation of the *Transfer of Land Act 1893*, to the Registrar of Deeds and Transfers.
- (2) On receiving a copy of an environmental protection notice delivered under subsection (1), the Registrar of Titles or the Registrar of Deeds and Transfers, as the case requires, shall, without payment of a fee, register the environmental protection notice and endorse or note accordingly the appropriate Register or register or record in respect of the land to which that notice relates.
- (3) When an environmental protection notice registered under subsection (2) is revoked under section 65, the CEO shall deliver to the Western Australian Planning Commission and to the Registrar of Titles or the Registrar of Deeds and Transfers, as the case requires, a certificate signed by the CEO and certifying that that revocation took place on the date specified in that certificate.
- (4) On receiving a certificate delivered under subsection (3), the Registrar of Titles or the Registrar of Deeds and Transfers, as the case requires, shall cancel the registration of the relevant environmental protection notice and endorse or note accordingly the appropriate Register or register or record in respect of the land to which that certificate relates.


~~(5) In this section—~~

~~*Registrar of Deeds and Transfers* has the meaning given by the *Registration of Deeds Act 1856*;~~

~~*Registrar of Titles* has the meaning given by the *Transfer of Land Act 1893*.~~

[Section 66 amended: No. 84 of 1994 s. 46; No. 81 of 1996 s. 153(1); No. 31 of 1997 s. 27; No. 54 of 2003 s. 46, 47 and 140(2).]

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67. Duties of person ceasing to be owner etc. of land subject to notice registered under s. 66

While an environmental protection notice remains registered under section 66, each owner or occupier of the land to which the environmental protection notice relates who does not, when he ceases to be such an owner or occupier, notify in writing —

- (a) the CEO of that fact and of the name and address of each person who succeeds ²m in the ownership or occupation or both, as the case requires, of that land; and
- (b) each person who succeeds ³m in the ownership or occupation or both, as the case requires, of that land of the content of the environmental protection notice and of the fact that the environmental protection notice is binding on that person,

commits an offence.

[Section 67 amended: No. 54 of 2003 s. 46 and 140(2).]

68. Restriction on subdividing etc. land subject to notice registered under s. 66

While an environmental protection notice remains registered under section 66, the Western Australian Planning Commission shall not approve under section 135 of the *Planning and Development Act 2005* the subdivision of the land to which the environmental protection notice relates or the amalgamation of that land with any other land unless the CEO consents to that approval.

[Section 68 amended: No. 84 of 1994 s. 46; No. 54 of 2003 s. 46 and 140(2); No. 38 of 2005 s. 15.]

68A. Closure notices, issue and effect of

- (1) In this section —

authorisation means a declaration under section 6, a clearing permit, ~~a works approval~~, a licence, an exemption under


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Change 'him' to 'him / her' or 'them'

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Change 'him' to 'him / her' or 'them'

section 75 or a licence, permit, approval or exemption under the regulations;

relevant premises means premises at which conduct is being or has been engaged in under an authorisation;

~~**relevant premises**, in relation to an authorisation, means premises —~~


~~(a) in respect of which the authorisation was issued; or~~

~~(b) at which conduct is being or has been engaged in under the authorisation;~~

specified means specified by the CEO in the closure notice concerned.

- (2) If the CEO considers on reasonable grounds that, as a result of anything that has been done or has happened at relevant premises before the expiry, revocation or suspension ~~before the expiry or revocation~~ of an authorisation, ongoing investigation, monitoring or management is or will be required at the premises following that expiry, revocation or suspension, ~~following that expiry or revocation~~, the CEO may cause a notice (a **closure notice**) to be given in respect of the premises.
- (3) If the authorisation is still in force, the closure notice is to be given to the person who holds the authorisation.
- (4) If the authorisation is not still in force, the closure notice is to be given to the person who held the authorisation or to the occupier or owner of the relevant premises.
- (5) If a person who is the owner of the relevant premises is not given the closure notice under subsection (3) or (4), a copy of the notice must be given to that person.
- (6) If a person who is the occupier of the relevant premises is not given the closure notice under subsection (3) or (4), a copy of the notice may be given to that person.


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- (7) A closure notice may require any person bound by it to do any one or more of the following in relation to the relevant premises —
- (a) take specified investigation and monitoring action;
 - (b) prepare a management plan;
 - (c) take specified management action;
 - (d) report on specified matters in a specified form at specified times;
 - (e) arrange for an audit of the premises to be carried out by a person nominated or approved by the CEO and report to the CEO on the findings of the audit as to whether or not the action required by the notice has been taken.
- (8) A closure notice is to specify —
- (a) the name and address of the person to whom it is given; and
 - (b) the reason for which it is given; and
 - (c) a description of the relevant premises and the location of the premises sufficient to identify both; and
 - (d) the things referred to in subsection (7) that are required to be done; and
 - (e) the period (if any) within which the things are to be done.
- (9) A closure notice —
- (a) while it subsists, binds each person to whom it is given; and
 - (b) while it remains registered under section 66 (as applied by subsection (10)), binds each successive owner or occupier of the land to which it relates.
- (10) Section 65(4) to (7) and [sections 66\(1\) and \(2\), 67](#) ~~sections 66, 67~~ and 68 apply in relation to closure notices as if references in those enactments to an environmental protection notice were references to a closure notice.

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- (10A) A closure notice given in respect of a suspended authorisation ceases to have effect when the suspension ceases to have effect.
- (10B) When a closure notice registered under section 66(2) as applied by subsection (10) ceases to have effect under subsection (10A) or is revoked under section 65(4) as applied by subsection (10), the CEO must deliver to the Western Australian Planning Commission and to the Registrar of Titles or the Registrar of Deeds and Transfers, as the case requires, a certificate signed by the CEO and certifying that that cessation or revocation took effect on the date specified in that certificate.
- (10C) On receiving a certificate delivered under subsection (10B), the Registrar of Titles or the Registrar of Deeds and Transfers, as the case requires, must cancel the registration of the relevant closure notice and endorse or note accordingly the appropriate Register or register or record in respect of the land to which that certificate relates.
- (11) If action required by a closure notice to be taken has not been taken, the CEO may —
- (a) cause that action to be taken; and
 - (b) recover the cost of the taking of that action from any person bound by the notice by action in a court of competent jurisdiction as a debt due to the Crown.
- (12) Any cost recovered under subsection (11)(b) is to be paid into the **2** **nsolidated Account.**

[Section 68A inserted: No. 54 of 2003 s. 81; amended: No. 77 of 2006 s. 4.]

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Change to 'Division 4 Notices, orders and directions'

 Number: 2 Author: CME WA Subject: Highlight Date: 17/01/2020
9:20:32 AM

Recommend update cost recovery mechanism.

69. Stop orders, issue and effect of

(1) If the Minister is satisfied that —

- (a) a person who is bound by an environmental protection notice has not complied with a requirement contained in the notice; and
- (b) the non-compliance referred to in paragraph (a) has caused, is causing or is about to cause conditions seriously detrimental to the environment or dangerous to human life or health,

he may by notice served on the person referred to in paragraph (a) order that person —

- (c) to stop carrying on the whole or any part of the trade, process or activity, and to close down the whole or any part of the premises, to which the environmental protection notice referred to in that paragraph relates immediately; and
- (d) to take such steps to deal with the conditions referred to in paragraph (b) as are specified in that notice within such period as is so specified.

(2) The Minister may, on serving a notice under subsection (1), cause to be taken such steps as he considers are necessary —

- (a) to stop the carrying on of the trade, process or activity, and to close down the premises, to which the environmental protection notice concerned relates; and
- (b) to deal with the conditions referred to in subsection (1)(b).

(3) The cost of taking any steps under subsection (2) is a debt due to the Crown by the person referred to in subsection (1)(a) and may be recovered from **2** by the Minister by action in a court of competent jurisdiction and shall, if so recovered, be credited to the **3** consolidated Account.

(4) The Minister may by notice served on the person to whom an order made under subsection (1) applies amend or, if he is

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 Number: 2 Author: CME WA Subject: Highlight Date: 17/01/2020 9:42:28 AM

Change 'him' to 'him / her' or 'them'

 Number: 3 Author: CME WA Subject: Highlight Date: 17/01/2020 9:20:38 AM

Recommend update cost recovery mechanism.

satisfied that steps have been taken to ensure that the conditions referred to in subsection (1)(b) will not arise again, revoke that order.

- (5) A person who does not comply with an order made against **2m** under subsection (1) commits an offence.

[Section 69 amended: No. 6 of 1993 s. 11; No. 49 of 1996 s. 64; No. 54 of 2003 s. 46 and 48; No. 77 of 2006 s. 4.]

70. Vegetation conservation notices, issue and effect of

- (1) In this section —

specified means specified by the CEO in the vegetation conservation notice concerned;

unlawful clearing means —

(a) anything constituting a contravention of section 51C or 51J; or

(b) anything constituting a contravention of an environmental protection covenant;

watercourse has the meaning given in Schedule 5 clause 2;

wetland has the meaning given in Schedule 5 clause 2.

~~*unlawful clearing* means anything constituting a contravention of section 51C or 51J.~~


- (2) If the CEO suspects on reasonable grounds —

(a) that unlawful clearing is likely to take place on any land; or


(b) that unlawful clearing is taking place or has taken place on any land,

the CEO may cause a notice (a *vegetation conservation notice*) to be given requiring a person bound by it to ensure that no unlawful clearing, or no further unlawful clearing, takes place on the land.

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Change to 'Division 4 Notices, orders and directions'

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Change 'him' to 'him / her' or 'them'

- (3) A vegetation conservation notice may be given to one or more of the following —
- (a) the owner of the land;
 - (b) the occupier of the land;
 - (c) a person other than the owner or occupier of the land, if the CEO considers that it is practicable for that person to comply with and give effect to the vegetation conservation notice.

- (4) A vegetation conservation notice —

~~(a)~~ is to specify —

- (a) the name and address of the person to whom it is given; and
- (b) the reason for which it is given;


~~and~~

- (4A) ~~in the case of a~~ vegetation conservation notice given under subsection (2)(b), may require any person bound by it —

(a) to take, within or for the duration of a specified period, such specified measures (the required action) as the CEO considers necessary for one or more of the following purposes —

- (i) to repair any damage caused by the clearing;
- (ii) to re-establish and maintain vegetation on any area affected by the clearing to a condition as near as possible to the condition of the vegetation before the clearing occurred;
- (iii) to prevent the erosion, drift or movement of sand, soil, dust or water;
- (iv) to ensure that specified land, or a specified watercourse or wetland ~~(within the meaning of the Rights in Water and Irrigation Act 1914)~~ will not be damaged or detrimentally affected, or further damaged or detrimentally affected, by the clearing;

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~~and within or for the duration of a specified period.~~

(b) to monitor, keep records of and report to the CEO on the required action.

- (5) Before a vegetation conservation notice containing a requirement under subsection (4A)(a~~b~~) is given to a person the CEO shall, by written notice given to the person, invite the person to make submissions to the CEO within such period as is specified in that notice on any matter relevant to the determination of whether or not the person should have to take the required action ~~specified measures~~.
- (6) The CEO shall consider any such submissions that are received from the person within the specified period.
- (7) A vegetation conservation notice —
- (a) while it subsists, binds each person to whom it is given; and
 - (b) if it is, and while it remains, registered under section 66 (as applied by subsection (9)), binds each successive owner or occupier of the land to which it relates.
- (8) Subsections (4) to (7) of section 65 apply in relation to vegetation conservation notices as if references in those subsections to an environmental protection notice were references to a vegetation conservation notice.
- (9) If the person, or at least one of the persons, to whom a vegetation conservation notice is given is the owner or occupier of the land, sections 66, 67 and 68 apply in relation to the vegetation conservation notice as if references in those sections to an environmental protection notice were references to a vegetation conservation notice.
- (10) If the required action, or any of it, ~~required by a vegetation conservation notice to be taken~~ has not been taken, the CEO may —
- (a) cause that action to be taken; and

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- (b) recover the cost of the taking of that action from any person bound by the notice by action in a court of competent jurisdiction as a debt due to the Crown.
- (11) Any cost recovered under subsection (10)(b) is to be paid into the **2** consolidated Account.

[Section 70 inserted: No. 54 of 2003 s. 111(1); amended: No. 77 of 2006 s. 4.]

71. Environmental protection directions, issue and effect of

- (1) Subject to this section, the CEO may —
 - (a) if he is satisfied that pollution, material environmental harm or serious environmental harm is occurring or is likely to occur; and
 - (b) with the approval of the Minister,

direct by radio broadcast or in such other manner as he considers expedient that —

- (c) the carrying on of any specified industry, trade or activity be prohibited; or
- (d) any specified industry, trade or activity be carried on subject to specified restrictions,


in a specified part of the State and during a specified period (whether definite or indefinite) or at a specified time.

- (2) The CEO may —
 - (a) with the approval of the Minister, amend; or
 - (b) revoke,


a direction given under subsection (1) in the same manner as that in which that direction was given.

- (3) A direction given under subsection (1) by radio broadcast shall be repeated by radio broadcast at least once on every day following the day on which that direction was given until that direction —
 - (a) is revoked under subsection (2); or

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Recommend update cost recovery mechanism.

- (b) is published in the *Gazette* under subsection (4),
whichever is the sooner.
- (4) The CEO shall, if the period in respect of which a direction is given under subsection (1) exceeds 3 days, cause that direction to be published in the *Gazette*.
- (5) A person who carries on a specified industry, trade or activity in contravention of a direction given under subsection (1) commits an offence.
- (6) In this section —
specified means specified in the relevant direction given under subsection (1).

[Section 71 amended: No. 54 of 2003 s. 49 and 140(2).]


72. Duty to notify CEO of discharges of waste

- (1) Subject to subsection (2), if a discharge of waste —
- (a) occurs as a result of an emergency, accident or malfunction; or
 - (b) occurs otherwise than in accordance with a ~~works approval or~~ licence or with a requirement contained in an environmental protection notice; or
 - (c) is of a prescribed kind or a kind notified in writing to the occupier concerned,

and has caused or is likely to cause pollution, material environmental harm or serious environmental harm, the occupier of the premises on or from which that discharge took place who does not, as soon as practicable after that discharge, give the CEO oral or electronic notification followed by written notification of the prescribed details of that discharge commits an offence.

- (2) Subsection (1) does not apply to or in relation to a discharge of waste which is of a kind prescribed for the purposes of this subsection.

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- (3) The occupier of premises from which a discharge of waste of a kind specified in a relevant NEPM occurs is to notify the CEO in the prescribed manner of the prescribed details of that discharge.
- (4) An occupier who contravenes subsection (3) commits an offence.
- (5) In subsection (3) —
relevant NEPM means an NEPM that is —
 - (a) taken to be an approved policy under section 37A; or
 - (b) specified by regulation to be a relevant NEPM.

[Section 72 amended: No. 14 of 1998 s. 31; No. 54 of 2003 s. 46(2), 50 and 140(2).]


73. Powers to deal with etc. discharges of waste, pollution and environmental harm

- (1) If an inspector or authorised person reasonably suspects that —
 - (a) any waste has been or is being discharged from any premises otherwise than in accordance with a ~~works approval~~, licence or requirement contained in a closure notice or an environmental protection notice; or
 - (b) a condition of pollution is likely to arise or has arisen; or
 - (c) a person has done, is doing, or is likely to do, an act in contravention of section 50A or 50B,

the inspector or authorised person may, with the approval of the CEO, take the action referred to in subsection (1a).

- (1a) The inspector or authorised person may, with such assistance as the inspector or authorised person considers appropriate —
 - (a) remove, disperse, destroy, dispose of or otherwise deal with the waste which has been or is being discharged; or
 - (b) prevent the condition of pollution from arising or control or abate that condition if it arises; or

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- (c) prevent the act referred to in subsection (1)(c) or control or abate the environmental harm if it arises,

as the case requires.

[(2) deleted]

- (3) When an inspector or authorised person has incurred any cost in acting under subsection (1), the CEO may recover that cost from the person who —

- (a) was the occupier of the premises from which the relevant waste was discharged at the time of that discharge; or
- (b) caused or allowed to be caused —
 - (i) the discharge referred to in paragraph (a); or
 - (ii) the likelihood of the relevant condition referred to in subsection (1)(b) arising or the arising of that condition; or
 - (iii) the likelihood of the relevant act referred to in subsection (1)(c) occurring or the occurrence of that act,

as the case requires, by action in a court of competent jurisdiction as a debt due to the Crown and shall pay any cost so recovered into the **2** consolidated Account.


- (4) If —

- (a) any waste has been or is being discharged from any premises otherwise than in accordance with a ~~works approval~~, licence or requirement contained in a closure notice or an environmental protection notice; or
- (b) a condition of pollution is likely to arise or has arisen; or
- (c) a person has done, is doing, or is likely to do, an act in contravention of section 50A or 50B,


the CEO may cause —

- (d) the waste to be removed, dispersed, destroyed, disposed of or otherwise dealt with; or

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Recommend update cost recovery mechanism.

- (e) the condition of pollution to be prevented from arising or, if that condition arises, that condition to be controlled or abated; or
 - (f) the act to be prevented from occurring or, if the environmental harm arises, that environmental harm to be controlled or abated.
- (4a) The CEO may recover the cost of the removal, dispersal, destruction, disposal or other dealing, or of the prevention, control or abatement, as the case requires, referred to in subsection (4) from the person who —
- (a) was the occupier of the premises at the time of the discharge referred to in subsection (4)(a); or
 - (b) caused or allowed to be caused —
 - (i) that discharge; or
 - (ii) the likelihood of the relevant condition referred to in subsection (4)(b) arising or the arising of that condition; or
 - (iii) the likelihood of the relevant act referred to in subsection (4)(c) occurring or the occurrence of that act,
- by action in a court of competent jurisdiction as a debt due to the Crown.


- (4b) Any cost recovered under subsection (4a) is to be paid into the **2** consolidated Account.

[Section 73 amended: No. 6 of 1993 s. 11; No. 73 of 1994 s. 4; No. 14 of 1998 s. 8; No. 54 of 2003 s. 51(1)-(5) and 140(2); No. 77 of 2006 s. 4.]


73A. Prevention notices, issue and effect of

- (1) If an inspector or authorised person reasonably suspects that —
- (a) any waste has been or is being discharged from any premises otherwise than in accordance with a ~~works approval~~ licence or requirement contained in a closure notice or an environmental protection notice; or

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Recommend update cost recovery mechanism.

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- (b) a condition of pollution is likely to arise or has arisen; or
- (c) a person has done, is doing, or is likely to do, an act in contravention of section 50A or 50B,

the inspector or authorised person may, with the approval of the CEO, give a notice (a **prevention notice**) to such person as the inspector or authorised person considers appropriate.

- (2) A prevention notice may require the person to whom the notice is given —

- (a) to remove, disperse, destroy, dispose of or otherwise deal with the waste which has been or is being discharged; or
- (b) to prevent the condition of pollution from arising or control or abate that condition if it arises; or
- (c) to prevent the act referred to in subsection (1)(c) or control or abate the environmental harm if it arises,


as the case requires and is to describe the action the inspector or authorised person considers appropriate to achieve that result.

- (3) When a person has complied with any requirements contained in a prevention notice given to the person under subsection (1), the CEO is to, if the person was not —

- (a) the occupier of the premises from which the relevant waste was discharged at the time of that discharge; or
- (b) the person who caused or allowed to be caused —
 - (i) the discharge referred to in paragraph (a); or
 - (ii) the likelihood of the relevant condition referred to in subsection (1)(b) arising or the arising of that condition; or
 - (iii) the likelihood of the relevant act referred to in subsection (1)(c) occurring or the occurrence of that act,

as the case requires, reimburse the person any cost incurred by the person in complying with those requirements.

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- (4) When the CEO has reimbursed any cost under subsection (3), the CEO may recover that cost from the person who —
- (a) was the occupier of the premises from which the relevant waste was discharged at the time of that discharge; or
 - (b) caused or allowed to be caused —
 - (i) the discharge referred to in paragraph (a); or
 - (ii) the likelihood of the relevant condition referred to in subsection (1)(b) arising or the arising of that condition; or
 - (iii) the likelihood of the relevant act referred to in subsection (1)(c) occurring or the occurrence of that act,

as the case requires, by action in a court of competent jurisdiction as a debt due to the Crown.


- (5) Any cost recovered under subsection (4) is to be paid into the **2** consolidated Account.
- (6) A person who intentionally or with criminal negligence does not comply with a requirement contained in a prevention notice given to that person, without reasonable excuse for that contravention, commits an offence.
- (7) A person who does not comply with a requirement contained in a prevention notice given to that person, without reasonable excuse for that contravention, commits an offence.
- (8) A person charged with committing an offence against subsection (6) may be convicted of an offence against subsection (7) which is established by the evidence.

[Section 73A inserted: No. 54 of 2003 s. 52; amended: No. 77 of 2006 s. 4.]

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Recommend update cost recovery mechanism.

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s. 73B

73B. Breach of notice issued under s. 65, 70 or 73A, damages for

(1) In this section —

notice means —

- (a) an environmental protection notice; or
- (b) a vegetation conservation notice; or
- (c) a prevention notice.

(2) If —

- (a) a person bound by a notice fails to comply with it; and
- (b) damage is caused to property not owned or occupied by the person; and
- (c) that damage would not have been caused if the notice had been complied with,

then, by reason of the person's failure to comply, the owner or occupier of the damaged property has a right of action in tort against the person in respect of the damage.

[Section 73B inserted: No. 54 of 2003 s. 52.]

Division 5 — Defences

Division 5 — Miscellaneous

~~*[Heading inserted: No. 54 of 2003 s. 53.]*~~

74. Defence of emergency or accident

(1) It is a defence to proceedings for an offence under this Part in respect of an emission or an act causing environmental harm if the person charged with that offence (the *alleged offender*) —

(a) proves —

- (i) that the emission or act occurred for the purpose of preventing danger to human life or health or irreversible damage to a significant portion of the environment; or

(ii) that the emission or act occurred as a result of an accident caused otherwise than by the negligence of the alleged offender and that the alleged offender took all reasonable precautions to prevent the emission or act;

and

(b) proves that as soon as was reasonably practicable after the emission or act occurred the alleged offender notified particulars of the emission or act in writing to the CEO.

(2) It is a defence to proceedings for an offence under section 49A(2) or (3) if the person charged with that offence (the *alleged offender*) —

(a) proves —

(i) that the waste was discharged or abandoned for the purpose of preventing danger to human life or health or irreversible damage to a significant proportion of the environment; or

(ii) that the waste was discharged or abandoned as a result of an accident caused otherwise than by the negligence of the alleged offender and that the alleged offender took all reasonable precautions to prevent the discharge or abandonment;

and

(b) proves that as soon as was reasonably practicable after the waste was discharged or abandoned the alleged offender notified particulars of the discharge or abandonment in writing to the CEO.

(3) It is a defence to proceedings for an offence under section 51C if the person charged with that offence (the *alleged offender*) —

(a) proves —

(i) that the clearing was done for the purpose of preventing danger to human life or health or

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irreversible damage to a significant proportion of the environment; or

(ii) that the clearing was done as a result of an accident caused otherwise than by the negligence of the alleged offender;

and

(b) proves that as soon as was reasonably practicable after the clearing was done the alleged offender notified particulars of the clearing in writing to the CEO.

(4) This section has effect subject to section 74E.

~~74. — Defences to certain offences~~

~~— (1) Subject to section 58 and subsection (2), it shall be a defence to proceedings for an offence under this Part in respect of an emission or an act causing environmental harm if the person charged with that offence proves that —~~

~~— (a) that emission or act occurred —~~

~~— (i) for the purpose of preventing danger to human life or health or irreversible damage to a significant portion of the environment; or~~

~~— (ii) as a result of an accident caused otherwise than by the negligence of that person;~~

~~— and that the occupier of the premises, if any, from which that emission or act occurred took all reasonable precautions to prevent that emission or act; and~~

~~— (b) as soon as was reasonably practicable after that emission or act that person notified particulars thereof in writing to the CEO.~~

~~(1AA) Subject to section 58 and subsection (2), it shall be a defence to proceedings for an offence under section 49A(2) or (3) if the person charged with the offence proves that —~~

~~— (a) the waste was discharged or abandoned —~~

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-
- ~~(i) for the purpose of preventing danger to human life or health or irreversible damage to a significant proportion of the environment; or~~
- ~~(ii) as a result of an accident caused otherwise than by the negligence of that person;~~
- ~~and~~
- ~~(b) as soon as was reasonably practicable after the waste was discharged or abandoned that person notified particulars of the discharge or abandonment in writing to the CEO.~~
- ~~(1a) Subject to subsection (2), it shall be a defence to proceedings for a Tier 1 offence if the person charged with that offence proves that —~~
- ~~(a) the person took reasonable precautions and exercised due diligence to prevent the commission of the offence; and~~
- ~~(b) as soon as was reasonably practicable after the occurrence that gave rise to the charge the person notified particulars of the occurrence in writing to the CEO.~~
- ~~(2) The defence referred to in subsection (1), (1AA) or (1a) is not available to a person unless he notifies the CEO of his intention to rely on that defence within 21 days after the day on which —~~
- ~~(a) the relevant summons is served on him; or~~
- ~~(b) if no summons is served on him in respect of the relevant offence, he is informed of the place and time at which he is alleged to have committed that offence and of the nature of that offence.~~
- ~~[Section 74 amended: No. 73 of 1994 s. 4; No. 14 of 1998 s. 9; No. 54 of 2003 s. 54 and 140(2); No. 48 of 2010 s. 6.]~~

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Division 5 Defences

s. 74A

1 A. Defence of authority of this Act~~Defences to offences of causing pollution etc.: authority of this Act~~

(1) It is ~~It is~~ a defence to proceedings under this Part for causing pollution, in respect of an emission, or for causing serious environmental harm or material environmental harm, or for discharging or abandoning waste in water to which the public has access if the person charged with that offence proves that the pollution, emission, environmental harm, discharge or abandonment occurred —

(a) in the implementation of a proposal in accordance with an implementation agreement or decision; or

(b) in accordance with —

(i) a prescribed standard; or

~~(ii) a clearing permit; or~~

~~(iii) a works approval; or~~

~~(iv) a licence; or~~

(v) a requirement contained in a closure notice, an environmental protection notice, a vegetation conservation notice or a prevention notice; or

(vi) an approved policy; or

(vii) a declaration under section 6; or

(viii) an exemption under section 75; or

(ix) an exemption given under the regulations;

~~(ix) a licence, permit, approval or exemption granted, issued or given under the regulations;~~

or

(ba) 2 authorised by, and in accordance with the conditions

or

(i) a clearing permit; or

(ii) a licence; or

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In this section, it needs to be clear that all things that stem from an activity are also covered (not just the emissions). For example, if a tailings dam is approved and this dam is specifically designed and approved as a leaking dam (not lined) and seepage is in accordance with the requirements and licence conditions. What is covered?

This is also a concern as environmental harm included potentiality and hence the 'thing' does not even necessarily have had to occur. Also, what will happen under this section when something that was considered at the time to be safe and hence authorised is later found to have been a potential problem eg: PFAS.

Number: 2 Author: CME WA Subject: Highlight Date: 16/01/2020
6:29:16 PM

This section appears to mean that defences will be lost and there is a much greater offence exposure for licensed activities (compared to current practice with WA and Licences). This is of significant concern to CME and may result in the need to list in great detail immaterial matters or drive attention of inspectors and offences (action) for immaterial matters.

Additionally, in many instances, surrogates are appropriately monitored and limited (controlled) for emissions rather than all emissions. These surrogates can not protect a licensee from the other emissions to which the surrogate relates so therefore all the

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on next page

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Division 5 Defences

s. 74A

74A. Defence of authority of this Act~~Defences to offences of causing pollution etc.: authority of this Act~~

(1) ~~It is~~ It is a defence to proceedings under this Part for causing pollution, in respect of an emission, or for causing serious environmental harm or material environmental harm, or for discharging or abandoning waste in water to which the public has access if the person charged with that offence proves that the pollution, emission, environmental harm, discharge or abandonment occurred —

(a) in the implementation of a proposal in accordance with an implementation agreement or decision; or

(b) in accordance with —

(i) a prescribed standard; or

~~(ii) a clearing permit; or~~

~~(iii) a works approval; or~~

~~(iv) a licence; or~~

(v) a requirement contained in a closure notice, an environmental protection notice, a vegetation conservation notice or a prevention notice; or

(vi) an approved policy; or

(vii) a declaration under section 6; or

(viii) an exemption under section 75; or

(ix) an exemption given under the regulations;

~~(ix) a licence, permit, approval or exemption granted, issued or given under the regulations;~~

or

(ba) as authorised by, and in accordance with the conditions of —

(i) a ³clearing permit; or

(ii) a licence; or

other matters will necessarily need to be listed and necessarily need to be monitored, potentially greatly increasing compliance costs and generating unnecessary work in order to avoid an offence. The interaction of licensing with the defences and offences and impacts on use of surrogates needs to be reconsidered.

📄 Number: 3 Author: CME WA Subject: Highlight Date: 17/01/2020
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A clearing permit must also provide a defence for necessarily associated matters directly stemming from the clearing. This must authorise the activity and the clearing.

(iii) a licence, permit or approval granted, issued or given under the regulations;

or

(c) in the exercise of any power conferred under this Act.


(2) **1** licence does not authorise an emission unless the emission is specified in the licence as an authorised emission.

[Section 74A inserted: No. 54 of 2003 s. 55; amended: No. 48 of 2010 s. 7.]

74B. Other defences to environmental harm offences

- (1) It is a defence to proceedings under this Part for causing serious environmental harm or material environmental harm if the person charged with that offence proves that the environmental harm was, or resulted from, an authorised act which did not contravene any other written law.
- (2) For the purposes of subsection (1) an act was authorised if it was —
 - (a) done in accordance with an authorisation, approval, requirement or exemption given in the exercise of a power under another written law; or
 - (b) done in the exercise by a public authority, or a member, officer or employee of a public authority, of a function conferred under another written law; or
 - (c) an act of a kind that the chief executive officer of the department of the Public Service principally assisting in the administration of the *Biosecurity and Agriculture Management Act 2007* has specified, by order published in the *Gazette*, to be a normal agricultural activity for the purposes of this paragraph; or
 - (d) an agricultural activity (including the management or harvesting of a plantation) done in compliance with a code of practice relating to an activity of that kind —
 - (i) issued under section 122A; or

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Recommend remove - refer to submission for detailed comments and earlier comments above.

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- (ii) made or approved under any other written law;
or
- (e) without limiting section 74A and paragraphs (a) to (d) of this subsection, clearing of a kind set out in Schedule 6;
or
- (f) an act of a kind prescribed for the purposes of section 51C that was not done in an environmentally sensitive area within the meaning of section 51A.

[Section 74B inserted: No. 54 of 2003 s. 55; amended: No. 54 of 2011 s. 4.]

74C. Defence of due diligence

- (1) It is a defence to proceedings for a Tier 1 offence if the person charged with that offence proves —
 - (a) that the person took reasonable precautions and exercised due diligence to prevent the commission of the offence; and
 - (b) that as soon as was reasonably practicable after the occurrence that gave rise to the charge the person notified particulars of the occurrence in writing to the CEO.
- (2) It is a defence to proceedings for an offence under section 51J(1), 53A, 53B, 62 or 63(3) if the person charged with that offence proves —
 - (a) that the person took reasonable precautions and exercised due diligence to prevent the commission of the offence; and
 - (b) that as soon as was reasonably practicable after the occurrence that gave rise to the charge the person notified particulars of the occurrence in writing to the CEO.
- (3) It is a defence to proceedings for an offence under section 62 in which the prosecution relies on the operation of section 63(4) if

the person charged with that offence (the *alleged offender*) proves —

- (a) that the person mentioned in section 63(2)(b) took reasonable precautions and exercised due diligence to prevent the occurrence that gave rise to the charge; and
 - (b) that as soon as was reasonably practicable after the occurrence that gave rise to the charge the person mentioned in section 63(2)(b), or the alleged offender, notified particulars of the occurrence in writing to the CEO.
- (4) Subsection (3) does not limit the application of subsection (2) to proceedings for an offence under section 62 in which the prosecutor relies on the operation of section 63(4).
- (5) This section has effect subject to section 74E.

74D. Defence of lack of knowledge of effect of licence

- (1) It is a defence to proceedings for an offence under section 63(3) if the person charged with that offence proves that the person did not know, and could not reasonably be expected to have known, that the carrying out of the work or activity mentioned in section 63(2)(a) constituted or was related to a licensed action as defined in section 63(1).
- (2) This section has effect subject to section 74E.

74E. Notice of defence

The defence referred to in section 74(1), (2) or (3), 74C(1), (2) or (3) or 74D(1) is not available to a person unless the person notifies the CEO of the person's intention to rely on that defence within 21 days after the day on which —

- (a) the relevant summons is served on the person; or
- (b) ¹no summons is served on the person in respect of the relevant offence, the person is informed of the place and time at which the person is alleged to have committed that offence and of the nature of that offence.

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Recommend remove subsection (b). There should be no timeframe until a summons is issued.

Division 6 — General


75. Discharges or emissions in emergencies

- (1) The CEO may, if there is, or is about to be, an emission from any premises for the purposes of —
 - (a) meeting a temporary emergency; or
 - (b) the temporary relief of a public nuisance or community hardship resulting from the commissioning of any item of fuel-burning equipment or industrial plant,on ¹his own initiative or at the instance of another person exempt the occupier of those premises from compliance with this Part for such period not exceeding 14 days, and subject to such conditions, as he specifies in that exemption.
 - (2) A person who is exempted under subsection (1) from compliance with this Part and who does not comply with any condition to which that exemption is subject commits an offence, and that exemption ceases to be in force on the occurrence of that non-compliance.
 - (3) Subject to subsection (4), the CEO may grant an exemption under subsection (1) orally or in writing.
 - (4) If the CEO grants an exemption under subsection (1) orally, he shall within a period of 24 hours of so granting it serve on the recipient of that exemption confirmation thereof in writing setting out the period and conditions specified in that exemption.
 - (5) Subject to this section, an exemption granted under subsection (1) remains in force until withdrawn by notice in writing served on the recipient of that exemption by the CEO.
- [Section 75 amended: No. 54 of 2003 s. 56 and 140(2).]*

76. Miscellaneous offences

- (1) A person who constructs, manufactures, assembles or sells a vehicle or vessel capable of discharging into the atmosphere or

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Change 'his' to 'their' or 'his / her'

any waters any matter that does not comply with any standard prescribed for the purposes of this subsection commits an offence unless he is exempted under the regulations from compliance with this subsection and so constructs, manufactures, assembles or sells in accordance with any condition to which that exemption is subject.

- (2) A person who constructs, manufactures, assembles, sells or installs or offers to install any equipment required by or under this Act to be fitted or equipped with any device so as to prevent or minimise discharges of any matter into the atmosphere or any waters without that equipment being so fitted or equipped commits an offence.

77. Vehicles and vessels, duties of owners etc. of

- (1) A person who is the owner or driver of a vehicle or vessel to which is fitted a device referred to in section 78(1) and who does not maintain that device, or cause it to be maintained, in an efficient condition commits an offence.
- (2) A person who is the owner or driver of a vehicle which is at the time of its use on a road, public place or reserve capable of discharging into the atmosphere or any waters any matter that does not comply with any standard prescribed for the purposes of this subsection commits an offence.
- (3) A person who is the owner of a vessel which is capable of discharging into the atmosphere or any waters any matter that does not comply with a standard prescribed for the purposes of this subsection commits an offence.

78. Interfering with anti-pollution devices on vehicles or vessels

- (1) A person who —
 - (a) removes, disconnects or impairs, or causes or allows to be removed, disconnected or impaired, a device fitted to a vehicle or vessel for the purpose of preventing the discharge of matter from, or controlling or dispersing matter discharged by, the vehicle or vessel into the

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atmosphere or any waters or of controlling noise emitted by the vehicle or vessel; or

- (b) adjusts or modifies, or causes or allows to be adjusted or modified, a device fitted to, or a part of, a vehicle or vessel, if that adjustment or modification results in the discharge into the atmosphere or any waters by the vehicle or vessel of any matter or in the emission of any noise by the vehicle or vessel that does not comply with the prescribed standard,

commits an offence.

- (2) Subsection (1) does not prohibit the removal, disconnection, impairment, adjustment or modification of a device, or the adjustment or modification of a part, referred to in that subsection —
 - (a) for the purpose of servicing, repairing or replacing that device or part or of improving its efficiency in minimising —
 - (i) pollution of the atmosphere or any waters; or
 - (ii) the discharge of matter or the emission of noise;
 - or
 - (b) as a temporary measure for the purpose of facilitating the service or repair of a vehicle or vessel.
- (3) A person who services or repairs, or causes or allows to be serviced or repaired, a vehicle or vessel in a manner prohibited by the regulations commits an offence.

79. Unreasonable noise emissions from premises

- (1) A person who on any premises uses or causes or allows to be used any equipment in such a way as to cause or allow it to emit, or otherwise emits or causes or allows to be emitted, unreasonable noise from those premises commits an offence.

- (2) Subject to subsection (3), a prosecution for an alleged offence under subsection (1) may be instituted only by —
- (a) any 3 or more persons, each of whom is the occupier of premises and claims to be directly affected by that alleged offence; or
 - (b) an authorised person; or
 - (c) a police officer.
- (3) A prosecution for an alleged offence under subsection (1) may be instituted by less than 3 persons if a person who is the occupier of premises and claims to have been directly affected by that alleged offence satisfies the court in which that prosecution is sought to be instituted before the accused is required to enter a plea that the circumstances are such that —
- (a) less than 3 persons were affected by that alleged offence; or
 - (b) other persons affected by that alleged offence are unable or unwilling to join in the institution of that prosecution for economic or other reasons not related to the question of whether or not that alleged offence was committed; or
 - (c) the enjoyment of the premises occupied by ¹m was affected by that alleged offence in a degree substantially greater than was the case with other premises so affected,

and that the prosecution is not of a frivolous, vexatious or unreasonable nature.

[Section 79 amended: No. 84 of 2004 s. 80 and 82.]

80. Installing equipment emitting unreasonable noise

- (1) A person who installs on or in any premises any equipment which, when operated, emits unreasonable noise and which ² knows or, if ³ had exercised reasonable care, would have known so to emit when so installed and operated, commits an offence.

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Change 'him' to 'him / her' or 'them'

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Change 'he' to 'he / she' or 'they'

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Change 'he' to 'he / she' or 'they'

- (2) If the occupier of any premises is convicted of committing an offence under this Act in respect of the emission of unreasonable noise by any equipment which was installed on or in those premises by another person in circumstances in which the other person committed an offence under subsection (1), that occupier may recover the cost of that installation, together with the amount of any penalty imposed on **1m** in respect of the first-mentioned offence, from the other person by action in a court of competent jurisdiction.

81. Noise abatement, powers for

- (1) If an authorised person or police officer considers that any unreasonable noise has been or is being emitted from any premises, the authorised person or police officer may —
- (a) direct, either orally or in writing as he considers appropriate —
 - (i) the person whom he believes to be the occupier of those premises to cause the emission of that unreasonable noise to cease; or
 - (ii) any person whom he believes to be making or contributing to the making of that unreasonable noise to cease making or contributing to the making of that unreasonable noise;
 - or
 - (b) take such measures or cause such measures to be taken as the authorised person or police officer considers necessary to abate the emission of that unreasonable noise or to remove the likelihood of any unreasonable noise being emitted.
- (2) A person who does not without reasonable excuse comply with a direction given by an authorised person or police officer under subsection (1) commits an offence.
- (3) A person shall not be convicted of an offence under subsection (2) unless it is proved that the noise to which the relevant direction relates was an unreasonable noise.

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Change 'him' to 'him / her' or 'them'

- (4) A direction given under subsection (1) shall have effect for such period not exceeding 7 days as is specified in that direction, but may within that period be revoked by —
- (a) the authorised person or police officer who gave it; or
 - (b) a person prescribed for the purposes of this subsection.

81A. Seizing noisy equipment

- (1) Where an authorised person or a police officer —
- (a) has given a direction under section 81(1)(a) in relation to any premises which has not been complied with; or
 - (b) has reason to believe that although a direction could be given under section 81(1)(a) in relation to any premises such a direction would not be complied with,

that person or officer may enter the premises and seize any equipment, or part of any equipment, which is or has been emitting, or contributing to the emission of, noise which the person or officer considers to be unreasonable.

- (2) Subject to subsection (2a), any equipment seized under subsection (1) is to be delivered, not later than 7 days after the seizure, to a person who appears to an authorised person or police officer to be entitled to possession of it, but in the event of any doubt or dispute as to that entitlement the equipment may be retained until the doubt or dispute is settled or determined.
- (2a) The CEO may require the person who appears or has been determined to be entitled to possession of equipment seized under subsection (1) to pay to the CEO the reasonable costs of seizing and storing the equipment, and the equipment is not required to be delivered under subsection (2) until those costs have been paid.
- (2b) A person is not to be required to pay costs under subsection (2a) if that person shows to the satisfaction of the CEO that he or she did not use or cause or allow to be used the equipment in the way that caused the equipment to emit the unreasonable noise that resulted in the seizure of the equipment.

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- (2c) If a person refuses to pay, or fails to pay within such reasonable time as is specified by the CEO, the reasonable cost of seizing and storing the equipment, the equipment may be disposed of in accordance with the regulations.
- (3) An authorised person or police officer who seizes any equipment under this section or a person who otherwise performs any function under this section in relation to equipment seized is not liable for any loss, damage or injury of or to the equipment unless it is shown that the person deliberately failed to take reasonable care of the equipment.
- (4) The regulations may make provision as to the seizure and storage of equipment under this section and the manner in which it is to be dealt with.

[Section 81A inserted: No. 50 of 1996 s. 9; amended: No. 54 of 2003 s. 127.]

82. Ancillary powers for s. 81 and 81A

- (1) An authorised person or police officer may, for the purpose of enabling 7 to give a direction, or to take or cause to be taken any measures, under section 81(1) or 81A in respect of noise emitted from any premises or to ascertain whether or not an offence under section 81(2) has been committed on any premises —
 - (a) enter those premises, with the aid of such other authorised persons or police officers as he considers necessary and, subject to subsection (3), with the use of reasonable force, at any time when he considers on reasonable grounds that an unreasonable noise has been or is being emitted from those premises; and
 - (b) whether or not he enters those premises, require any person —
 - (i) who he considers on reasonable grounds was or is present in or on those premises at any time during which noise was or is being emitted from those premises; and

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Change 'him' to 'him / her' or 'them'

- (ii) to whom he has given an oral or written warning of the obligation of that person to furnish ^{1m} with the name and address of that person and with the name and address of the occupier of those premises,

to furnish ^{2m} with the names and addresses referred to in subparagraph (ii).

- (2) A person who does not comply with a requirement made under subsection (1)(b) commits an offence.
- (3) An authorised person shall not, if he exercises the power referred to in subsection (1)(a), use force in so doing unless he is, or is accompanied by, a police officer.

[Section 82 amended: No. 50 of 1996 s. 10.]

83. Duty to give assistance and information to officials

The occupier of any premises and any person in charge or apparently in charge of any premises or public place who does not furnish to an authorised person or police officer all reasonable assistance and all information that —

- (a) the authorised person or police officer requires of ^{3m}; and
- (b) that occupier or person is capable of furnishing with respect to the exercise of the powers, and the discharge of the duties, of the authorised person or police officer under this Part commits an offence.

[Section 83 amended: No. 50 of 1996 s. 11.]

84. Excessive noise emissions from vehicles or vessels

- (1) A person who is the owner or driver of a vehicle or vessel which does not comply with any noise emission standard prescribed for the purposes of this subsection commits an offence.
- (2) In any proceedings for an alleged offence under subsection (1), evidence that a vehicle or vessel was found on inspection, measurement or test made by an inspector not more than 6 weeks after the date of that alleged offence not to comply with

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Number: 3 Author: CME WA Subject: Highlight Date: 17/01/2020
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any noise emission standard prescribed for the purposes of subsection (1) is evidence that the vehicle or vessel did not so comply on that date.

85. Excessive noise emissions from equipment

- (1) A person who is the owner of any equipment, other than a vehicle or vessel, which is at the time of its use capable of emitting noise that does not comply with any noise emission standard prescribed for the purposes of this subsection commits an offence.
- (2) In any proceedings for an alleged offence under subsection (1) evidence that any equipment was found on inspection, measurement or test made by an inspector not more than 6 weeks after the date of that alleged offence to be capable of emitting noise that did not comply with any noise emission standard prescribed for the purposes of subsection (1) is evidence that the equipment was so capable on that date.

86. Manufacture, sale etc. of products emitting excessive noise

- (1) The occupier of any premises where there is manufactured, assembled, supplied, distributed, stored or sold —
 - (a) any new equipment, other than a vehicle or vessel, which is powered by internal combustion or electricity or operated by hydraulic or pneumatic means; or
 - (b) any vehicle or vessel,which when operated under prescribed test conditions emits noise that does not comply with the noise emission standard prescribed for the purposes of this subsection in respect of the type of equipment, vehicle or vessel to which that equipment, vehicle or vessel belongs commits an offence.
- (2) The occupier of any premises where there is sold any equipment which is required by or under this Act —
 - (a) to be fitted or equipped with any device so as to prevent or minimise the emission of noise, without that device being so fitted or equipped; or

- (b) to be fitted with a prescribed plate, label or other marking stating such information as is prescribed, without that plate, label or marking being so fitted, commits an offence.
- (3) The occupier of any premises on which there is sold any noise control device which, when fitted to any equipment in accordance with the fitting instructions of the manufacturer of that device and operated under prescribed test conditions, does not prevent the equipment from emitting noise that does not comply with the noise emission standard prescribed for the purposes of this subsection in respect of the type of equipment to which the equipment belongs commits an offence.
- (4) A person who is convicted of an offence under subsection (1) in respect of any equipment, vehicle or vessel may, if he did not cause the deficiency in the equipment, vehicle or vessel which led to that conviction, recover from the person who supplied the equipment, vehicle or vessel to the person so convicted the cost to the person so convicted of being supplied with the equipment, vehicle or vessel, together with the amount of the penalty imposed on the person so convicted in respect of that offence, by action in a court of competent jurisdiction.

Part VA — Financial assurances

[Heading inserted: No. 54 of 2003 s. 87.]

86A. Terms used

In this Part —

authorisation means a declaration under section 6, a clearing permit, ~~a works approval~~, a licence, an exemption under section 75 or a licence, permit, approval or exemption under the regulations;

financial assurance requirement means a requirement to provide a financial assurance imposed —

- (a) as an implementation condition; or
- (b) as a condition of an authorisation; or
- (c) under section 86B(2);

responsible person means —

- (a) in relation to a proposal, the proponent; or
- (b) in relation to an authorisation, the holder of the authorisation or, in the case of a declaration or exemption, a person required to comply with a condition of ~~the exemption~~ the declaration or exemption; or
- (c) in relation to a closure notice, the person bound by the notice; or
- (d) in relation to an environmental protection notice, the person bound by the notice; or
- (e) in relation to a vegetation conservation notice, the person bound by the notice; or
- (f) in relation to a prevention notice, the person to whom the notice is given.

[Section 86A inserted: No. 54 of 2003 s. 87.]

86B. Financial assurance requirements, imposition and effect of

- (1) Implementation conditions or conditions of an authorisation may require the responsible person to provide a financial assurance of a kind specified in the conditions within the time specified in the conditions.
- (2) The CEO may by written notice require —
 - (a) a person bound by a closure notice; or
 - (b) a person bound by an environmental protection notice; or
 - (c) a person bound by a vegetation conservation notice; or
 - (d) a person to whom a prevention notice is given,to provide a financial assurance of a kind specified in the notice within a time specified in the notice.
- (3) A person who fails to comply with a requirement under subsection (2) commits an offence.
- (4) A financial assurance may be required to be given in one or more of the following forms —
 - (a) a bank guarantee;
 - (b) a bond;
 - (c) an insurance policy;
 - (d) another form of security that the CEO specifies.
- (5) The CEO may require a financial assurance to be provided before an authorisation is declared, granted, amended or suspended.
- (6) A financial assurance requirement may provide for the procedures under which the financial assurance may be called on or used.
- (7) If a financial assurance is provided as a condition of an authorisation, the CEO may, before the authorisation ceases to

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have effect, require the responsible person to continue to provide the financial assurance under subsection (2).

[Section 86B inserted: No. 54 of 2003 s. 87.]

86C. Minister's consent needed to impose etc. financial assurance requirement

- (1) A financial assurance requirement is not to be imposed under section 86B(1) or (2), or continued under section 86B(7), by the CEO unless the Minister has consented to the imposition or continuation.
- (2) In determining whether to —
- (a) seek the consent of the Minister to the imposition of a financial assurance requirement under section 86B(1), the CEO; and
 - (b) consent to the imposition, the Minister,
- is to have regard to —
- (c) the degree of risk of pollution or environmental harm associated with the implementation of the authorisation; and
 - (d) the likelihood of action being required to deal with waste or prevent, control or abate pollution or environmental harm arising from acts associated with the implementation of the authorisation; and
 - (e) the environmental record of the responsible person or proposed responsible person; and
 - (f) other financial assurances required to be held by the responsible person or proposed responsible person under this Act and other written laws; and
 - (g) any other matters prescribed.
- (3) In determining whether to —
- (a) seek the consent of the Minister to the imposition of a financial assurance requirement under section 86B(2) or continuation under section 86B(7), the CEO; and

- (b) consent to the imposition or continuation, the Minister,
is to have regard to —
 - (c) the extent of action required under the closure notice,
environmental protection notice or prevention notice;
and
 - (d) the environmental record of the responsible person; and
 - (e) other financial assurances required to be held by the
responsible person under this Act and other written laws;
and
 - (f) any other matters prescribed.
- (4) In determining whether to impose a financial
assurance requirement as an implementation condition,
the Minister is to have regard to the matters set out in
subsection (2)(c) to (g) as if the proposal were an authorisation.

[Section 86C inserted: No. 54 of 2003 s. 87.]

86D. Amount of financial assurance

The amount of the financial assurance —

- (a) is to be specified in the financial assurance requirement;
and
- (b) is not to exceed an amount that, in the opinion of the
CEO, represents a reasonable estimate of the total likely
costs and expenses that may be incurred in taking action
in that case or in reimbursing a person for any action
taken.

[Section 86D inserted: No. 54 of 2003 s. 87.]

86E. Claim on or realising of financial assurance

- (1) This section applies if —
 - (a) the Minister incurs costs in taking action under
section 48(4) or 69(2); or

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- (b) an authorised person or inspector incurs costs in taking action under section 73(1); or
 - (c) the CEO incurs costs in taking action under [section 68A\(11\)\(a\), 70\(10\) or ~~section 68A\(11\)\(a\) or~~](#) 73(4); or
 - (d) the CEO reimburses costs under section 73A(3),
and the person from whom those costs are or would be recoverable under this Act is a person who has provided a financial assurance.
- (2) The Minister or the CEO may recover the reasonable costs of taking the action, or the costs reimbursed, by making a claim on or realising the financial assurance or part of it.
- (3) Before making the claim on or realising the financial assurance or part of it, the Minister or the CEO is to make all reasonable endeavours to give the responsible person a written notice under this section.
- (4) The notice is to —
 - (a) state details of the action taken; and
 - (b) state the amount of the financial assurance to be claimed or realised; and
 - (c) invite the responsible person to make representations to the Minister or the CEO to show why the financial assurance should not be claimed or realised as proposed; and
 - (d) state the period (at least 30 days after the notice is given to the responsible person) within which representations may be made.
- (5) The representations must be made in writing.
- (6) After the end of the period stated in the notice, the Minister or the CEO is to consider any representations properly made by the responsible person.

- (7) If the Minister or the CEO decides to make a claim on or realise the financial assurance or part of it, the Minister or the CEO is to immediately make reasonable endeavours to give written notice to the responsible person of the decision and the reasons for the decision.

- (8) Any costs recovered under this section are to be paid into the **1 consolidated Account.**

[Section 86E inserted: No. 54 of 2003 s. 87; amended: No. 77 of 2006 s. 4.]


86F. Lapsing of financial assurance requirement

- (1) The requirement to provide financial assurance lapses and no longer binds the responsible person if the CEO is satisfied that the reason for which the financial assurance was required no longer exists and has given the responsible person written notice of the lapsing of the financial assurance requirement.
- (2) If a responsible person makes a written request to the CEO for advice as to whether the reason for which a financial assurance provided by that person was required still exists, the CEO is to provide that advice.

[Section 86F inserted: No. 54 of 2003 s. 87.]

86G. Use of financial assurance not to affect other action

- (1) Subject to subsections (3) and (4), a financial assurance may be called on and used, despite and without affecting —
- (a) any liability of the responsible person to any penalty for an offence for a contravention to which the financial assurance relates; and
 - (b) any other action that might be taken or is required to be taken in relation to any contravention or other circumstances to which the financial assurance relates.
- (2) If the amount of financial assurance claimed or realised does not cover all the costs concerned, the Minister or CEO may recover the excess from the responsible person under [section 48\(5\)](#).

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Recommend update cost recovery mechanism.

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68A(11)(b), 69(3), 70(10), 73(4a) ~~section 48(5), 68A(11)(b), 69(3), 73(4a)~~ or 73A(4), as the case requires.

(3) The Minister is not entitled —

- (a) to recover costs under section 48(5) or 69(3) if a financial assurance has been called on and used in respect of those costs (except to the extent that the financial assurance does not cover all the costs); or
- (b) to call on or use a financial assurance in respect of costs which have been recovered under section 48(5) or 69(3).

(4) The CEO is not entitled —

- (a) to recover costs under section 68A(11)(b), 70(10), 73(4a) ~~section 68A(11)(b), 73(4a)~~ or 73A(4) if a financial assurance has been called on and used in respect of those costs (except to the extent that the financial assurance does not cover all the costs); or
- (b) to call on or use a financial assurance in respect of costs which have been recovered under section 68A(11)(b), 70(10), 73(4a) ~~section 68A(11)(b), 73(4a)~~ or 73A(4).

[Section 86G inserted: No. 54 of 2003 s. 87.]

Part VB — Environmental protection covenants

86H. Terms used

In this Part —

native vegetation has the meaning given in section 51A;

occupier of land has the meaning given in section 51A;

owner of land has the meaning given in section 51A;

relevant land registration officer means —

- (a) where the land is under the operation of the *Transfer of Land Act 1893* or the *Land Administration Act 1997*, the Registrar of Titles; and
- (b) where the land is alienated from the Crown but is not under the operation of the *Transfer of Land Act 1893*, the Registrar of Deeds and Transfers.

86I. CEO may enter into environmental protection covenant

- (1) The CEO may enter into an environmental protection covenant with the owner of land if it is a condition of a clearing permit, or of an implementation agreement or decision in respect of a proposal, that the owner enter into the covenant.
- (2) An environmental protection covenant requires the consent in writing of each person who is an owner or occupier of the land to which the covenant applies at the time it is entered into.

86J. Form of environmental protection covenant

- (1) An environmental protection covenant must —
 - (a) be prepared by the CEO; and
 - (b) identify the land to which it applies; and
 - (c) identify each person who is an owner or occupier of that land.
- (2) The CEO may, for the purpose of preparing an environmental protection covenant, by written notice require the owner of the land to which the covenant will apply to provide the CEO with

s. 86K

specified surveys or other specified information within a specified time.

(3) An environmental protection covenant may contain such provisions as the CEO and the owner of the land agree.

(4) Without limiting subsection (3), an environmental protection covenant may —

(a) restrict the use of land to which it applies; and

(b) require specified work or work of a specified kind to be carried out in accordance with specified standards on the land; and

(c) restrict the nature of work that may be carried out on the land.

(5) An environmental protection covenant —

(a) may be expressed to have effect for a period of time specified in the covenant or in perpetuity; and

(b) may be expressed to be irrevocable.

(6) The costs and expenses of preparing and registering an environmental protection covenant must be borne —

(a) if it is a condition of a clearing permit that the covenant be entered into, by the holder of the clearing permit; or

(b) if it is a condition of an implementation agreement or decision that the covenant be entered into, by the proponent of the proposal.

(7) The CEO may require the payment of the costs and expenses referred to in subsection (6) before entering into the covenant.

86K. Registration of environmental protection covenant

(1) The CEO may deliver a memorial of an environmental protection covenant to the relevant land registration officer.

(2) The memorial must be in a form approved by the relevant land registration officer.

- (3) The relevant land registration officer must register the memorial and accordingly endorse or note the appropriate register or record in respect of the land to which the environmental protection covenant applies.

86L. Binding effect of environmental protection covenant

An environmental protection covenant —

- (a) binds the owner of land by whom it was given for so long as the covenant subsists and that person continues to be the owner of the land; and
- (b) binds each occupier of the land who consented to the covenant for so long as the covenant subsists and that person continues to be an occupier of the land; and
- (c) while a memorial of the covenant remains registered under section 86K, binds each successive owner or occupier of the land.

86M. Application for amendment of environmental protection covenant

- (1) An owner of land who is bound by an environmental protection covenant under section 86L(a) or (c) may apply to the CEO for the amendment of the environmental protection covenant.

- (2) **1** An application under subsection (1) for the amendment of an environmental protection covenant must —

- (a) be made in the form and in the manner approved by the CEO; and
- (b) contain or be accompanied by any information required as indicated in the form or in material accompanying the form; and
- (c) be accompanied by the fee prescribed by or determined under the regulations.

- (3) If the CEO requires further information to determine the application, the CEO may, by written notice given to the

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The current drafting may create a Forrest & Forrest issue, as it requires that if the form, fee and supporting information are not all simultaneously received by the Department, the application must be declined by the CEO.

Strongly recommend removal of 'accompanied by'.

s. 86N

applicant, require the applicant to give the CEO further specified information within a specified time.

(4) If the application does not comply with subsection (2) or further information is not provided in accordance with subsection (3), the CEO must decline to deal with the application and advise the applicant accordingly.

(5) If, under subsection (4), the CEO declines to deal with the application, the CEO does not have to perform any function under section 86N(1) or (5) in relation to the application.

86N. Amendment of environmental protection covenant

(1) On an application under section 86M(1) for the amendment of an environmental protection covenant the CEO must —

(a) amend the covenant; or

(b) refuse to amend the covenant.

(2) Subject to subsection (3), the CEO may amend an environmental protection covenant on the CEO's initiative.

(3) An environmental protection covenant may be amended under subsection (2) —

(a) to correct in the covenant —

(i) a clerical mistake or unintentional error or omission; or

(ii) a figure which has been miscalculated; or

(iii) the misdescription of any person, thing, area, property or activity;

or

(b) to make an administrative change to the format of the covenant which does not alter the obligations of the covenantor; or

(c) to bring the covenant into conformity with an approved policy or with an exemption conferred under this Act; or

- (d) to give effect to a decision of the Minister under this Act (whether on an appeal or otherwise); or
- (e) as agreed to by each person who is bound by the covenant.
- (4) The CEO must give written notice of any amendment under this section of an environmental protection covenant —
 - (a) to each person who is bound by the covenant; and
 - (b) if the covenant is registered under section 86K, to the relevant land registration officer.
- (5) If under subsection (1) the CEO refuses to amend an environmental protection covenant, the CEO must give written notice of the refusal to the applicant.

86O. Enforcement of environmental protection covenant

- (1) A person bound by an environmental protection covenant who contravenes the covenant commits an offence.
- (2) Section 51R applies to any proceedings under this section as if the proceedings were proceedings under Part V Division 2.

86P. Duties upon passing interests in affected land

- (1) While a memorial of an environmental protection covenant remains registered under section 86K, each owner or occupier of the land to which the covenant relates must —
 - (a) before agreeing with another person in writing that the other person will succeed the owner or occupier in ownership or occupation or both, as the case requires, of that land notify the other person in writing of the following —
 - (i) the content of the covenant;
 - (ii) the fact that the covenant will be binding on the other person if the other person succeeds the owner or occupier in ownership or occupation or both;

s. 86Q

_____ and

- (b) within 14 days after ceasing to be an owner or occupier of the land to which the covenant relates, notify the CEO in writing of that cessation and of the name and address of each person who succeeds the owner or occupier in the ownership or occupation or both, as the case requires, of that land.

- (2) A person who contravenes subsection (1) commits an offence.

86Q. Discharge of environmental protection covenant

- (1) In this section —

revocable environmental protection covenant means an environmental protection covenant that is not expressed to be irrevocable.

- (2) A person who is bound by a revocable environmental protection covenant may apply in writing to the CEO for the discharge of the covenant.

- (3) On an application under subsection (2) for the discharge of a revocable environmental protection covenant the CEO must —

- (a) subject to subsection (5), discharge the covenant; or
(b) refuse to discharge the covenant.

- (4) Subject to subsection (5), a revocable environmental protection covenant may be discharged by the CEO on the CEO's initiative.

- (5) The CEO may discharge a revocable environmental protection covenant under this section if, and only if, the CEO is of the opinion that —

- (a) the covenant is no longer necessary; or
(b) there is other just cause for discharging the covenant.

- (6) If a revocable environmental protection covenant is discharged under this section —
- (a) the CEO must give written notice of the discharge to each person bound by the covenant; and
 - (b) if the covenant is registered under section 86K, the CEO must give a certificate under section 86R(1) to the relevant land registration officer.
- (7) If under subsection (3) the CEO refuses to discharge a revocable environmental protection covenant, the CEO must give written notice of the refusal to the applicant.

86R. Cancelling registration of memorial

- (1) If an environmental protection covenant registered under section 86K is discharged under section 86Q, the CEO must give the relevant land registration officer a certificate in a form approved by the relevant land registration officer and signed by the CEO certifying that the covenant was discharged on the date specified in the certificate.
- (2) The relevant land registration officer must, on receiving a certificate under subsection (1), cancel the registration of the memorial of the environmental protection covenant and endorse or note the appropriate register or record accordingly.

Part VI — Enforcement

87. Authorised persons, appointment of

- (1) The CEO may appoint persons or members of classes of persons to be authorised persons for the purposes of this Act and may, when making such an appointment and without limiting the generality of section 52 of the *Interpretation Act 1984*, limit the powers conferred on the persons or members so appointed by specifying in the authorities issued to those persons or members under subsection (2) —
- (a) which of those powers those persons or members are entitled to exercise; or
 - (b) during which portions of each day of 24 hours those persons or members may exercise those powers which they are entitled to exercise,
- or both, and that limitation shall have effect according to its tenor.
- (2) The CEO shall cause to be issued to each authorised person an authority in writing signed by the CEO and bearing a photograph of that authorised officer.
- (3) An authorised person shall produce the authority issued to **1m** under subsection (2) whenever required to do so —
- (a) by a person in respect of whom **2** has exercised, is exercising, or is about to exercise any of the powers —
 - (i) conferred on **3m** by or under this Act; and
 - (ii) which **4** is entitled to exercise;or
 - (b) on applying for admission to any premises or place which an authorised person is empowered by this Act to enter.
- (4) The appointment of a person under subsection (1) does not —
- (a) render Part 3 of the *Public Sector Management Act 1994*, or any other Act applying to persons as

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Change 'him' to 'him / her' or 'them'

Number: 2 Author: CME WA Subject: Highlight Date: 17/01/2020
9:33:07 AM

Change 'he' to 'he / she' or 'they have'

Number: 3 Author: CME WA Subject: Highlight Date: 17/01/2020
9:33:14 AM

Change 'him' to 'him / her' or 'them'

Number: 4 Author: CME WA Subject: Highlight Date: 17/01/2020
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Change 'he' to 'he / she' to they'

officers of the Public Service of the State, applicable to the person; or

- (b) affect or prejudice the application to the person of any Act referred to in paragraph (a) if it applied to [1]m at the time of [2]s appointment.

[Section 87 amended: No. 32 of 1994 s. 19; No. 54 of 2003 s. 140(2).]

88. Inspectors, appointment and purposes of

- (1) The CEO may appoint a person to be an inspector for the purposes of this Act and, in particular, for the purposes of —
- (a) taking measurements and collecting samples of any waste before, during or after its discharge into the environment; and
 - (b) inspecting, evaluating and analysing the records of monitoring and other equipment and installations approved for detecting the presence, quantity and nature of any waste and the effects of that waste on the portion of the environment approved for receiving that waste; and
 - (c) recording, measuring, testing or analysing noise, odour and electromagnetic radiation emissions; and
 - (d) inspecting, evaluating and analysing the records of monitoring and other equipment and installations approved for detecting the presence, level and other characteristics of noise, odour and electromagnetic radiation; and
 - (e) ascertaining whether or not any circumstances, conditions, procedures or requirements imposed by or under this Act are being complied with; and
 - (f) performing such other functions as are conferred or imposed on [3]m by or under this Act.
- (2) Notwithstanding anything in this Act but without limiting the generality of section 52 of the *Interpretation Act 1984*, the CEO


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Change 'him' to 'him / her' or 'them'

 Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020 1:57:11 PM

Change 'his' to 'their' or 'his / her'

 Number: 3 Author: CME WA Subject: Highlight Date: 17/01/2020 11:01:16 AM

Change 'him' to 'him / her' or 'their'

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may, when appointing an inspector under subsection (1), limit the powers conferred on the inspector by or under this Act by specifying in the authority issued to the inspector under subsection (3) which of those powers the inspector is entitled to exercise, and that limitation shall have effect according to its tenor.

- (3) The CEO shall cause to be issued to each inspector an authority in writing signed by the CEO and bearing a photograph of that inspector.
- (4) An inspector shall produce the authority issued to **1m** under subsection (3) whenever required to do so —
- (a) by a person in respect of whom **2** has exercised, is exercising or is about to exercise any of the powers —
 - (i) which are conferred on **3m** by or under this Act; and
 - (ii) which **4** is entitled to exercise;
 - or
 - (b) on applying for admission to any premises or place which an inspector is empowered by this Act to enter.
- (5) The appointment of a person under subsection (1) does not —
- (a) render Part 3 of the *Public Sector Management Act 1994*, or any other Act applying to persons as officers of the Public Service of the State, applicable to the person; or
 - (b) affect or prejudice the application to the person of any Act referred to in paragraph (a) if it applied to **5m** at the time of **6s** appointment.
- (6) In subsection (1) —


approved means approved by the CEO.

[Section 88 amended: No. 32 of 1994 s. 19; No. 54 of 2003 s. 140(2).]


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Change 'him' to 'him / her' or 'them'

 Number: 2 Author: CME WA Subject: Highlight Date: 17/01/2020 9:34:21 AM


Change 'he' to 'he / she' or 'they have'

 Number: 3 Author: CME WA Subject: Highlight Date: 17/01/2020 9:34:03 AM


Change 'him' to 'him / her' or 'them'

 Number: 4 Author: CME WA Subject: Highlight Date: 17/01/2020 9:34:37 AM

Change 'he' to 'he / she' or 'they are'

 Number: 5 Author: CME WA Subject: Highlight Date: 17/01/2020 9:34:51 AM

Change 'him' to 'him / her' or 'them'

 Number: 6 Author: CME WA Subject: Highlight Date: 13/01/2020 1:57:43 PM

Change 'his' to 'their' or 'his / her'

1. Entry powers of inspectors

- (1) An inspector may ~~with such assistance as he may require~~ enter —
- (a) at any time any premises used as a factory or any premises in which an industry, trade or process is being carried on; or
 - (aa) at any time, any site classified as *contaminated* — *remediation required* under the *Contaminated Sites Act 2003*; or
 - (b) at any time, premises at or from which the inspector has reasonable grounds to believe that an offence against this Act has been, is being or is likely to be committed; or
 - (c) at any reasonable time, any other premises,
- and may therein or thereon do any act or thing, including the collection and removal of samples, which in the opinion of the inspector is necessary to be done for —
- (d) the prescribing of any matter under this Act or for the preparation of a draft policy; or
 - (e) the assessment of a proposal or scheme and the preparation of a report thereon; or
 - (ea) the implementation or operation of an environmental monitoring programme; or
 - (f) determining whether or not there has been compliance with or contravention of —
 - (i) any requirement made by or under this Act; or
 - (ii) any conditions agreed or decided under Part IV, any clearing permit, environmental protection covenant or licence ~~clearing permit, works approval or licence~~ or condition specified therein or any requirement contained in a closure notice, environmental protection notice, vegetation conservation notice, prevention notice, exemption given under section 75(1) or any

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CME is unclear as to how this will interact with the MSIA and the duties therein. This needs to be fully assessed and protections afforded to those potentially liable under the MSIA due to unauthorised actions taken by inspectors.

s. 89

condition specified in that exemption or any other requirement, by whatever name called, made by or under this Act; ~~this Act.~~

(g) determining whether an offence under this Act has been, is being or is likely to be committed.

- (2) Despite subsection (1), an inspector is not entitled to enter a private dwelling-house or on land used in connection with a private dwelling-house unless the inspector —
- (a) reasonably believes that waste is being, or has recently been, discharged from that house or land into the environment; or
 - (aa) reasonably believes that the house or land is contaminated; or
 - (b) finds that unreasonable noise is being, or believes that unreasonable noise has recently been, emitted from the house or land into the environment; or
 - (c) reasonably believes that the house or land has been adversely affected by an emission.
- (3) Without limiting the generality of subsection (1), an inspector may ~~with such assistance as he may require~~ enter on any land and drill boreholes for the purpose of taking and removing samples of rock, soil or water and making geological studies —
- (a) to assess the effect of a proposed discharge of waste; or
 - (b) to monitor the effect of a discharge of waste; or
 - (c) if the inspector believes on reasonable grounds that the land or water is contaminated, to investigate whether contamination is present or to monitor or assess any contamination that is present,
- and to do all such acts and things as may be necessary therefor or in relation thereto.
- (4) Before exercising in relation to any land which —
- (a) is occupied by a person or persons; or

- (b) if it is not occupied by a person or persons, has been alienated from the Crown for any estate of freehold,

the power of entry conferred on ¹m by subsection (3), an inspector shall not less than 14 days before the proposed exercise of that power give notice to the occupier of that land or, if there is no such occupier, to any person who appears to be the owner of that land specifying —

- (c) the part of that land on which entry is to be made; and
(d) the work proposed to be carried out on the part referred to in paragraph (c); and
(e) the name and, in the case of a person who is not self-employed, the employer of every person who is to enter on that land to carry out the work referred to in paragraph (d).

[Section 89 amended: No. 23 of 1996 s. 21; No. 14 of 1998 s. 10 and 32; No. 54 of 2003 s. 22 and 57; No. 60 of 2003 s. 100 (as amended: No. 40 of 2005 s. 13(4) and (5)).]

89A. Use of assistance and force

- (1) An inspector may use assistance and force that is reasonably necessary in the circumstances when exercising a power under section 89 but cannot use force against a person.
- (2) If the use of reasonable force is likely to cause significant damage to property, the inspector is not entitled to use force without the prior authority of the CEO in the particular case.
- (3) An inspector may request a police officer or other person to assist the inspector in exercising a power under this Part, and that person may assist the inspector in the exercise of the power.
- (4) A person while assisting an inspector at the request of the inspector and in accordance with this Act —
- (a) has the same powers as are ²nferred on an inspector under this Part; and

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Change 'him' to 'him / her' or 'them'

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Current drafting provides that a person assisting an inspector has all of the powers as an inspector, not simply those which are being exercised by the inspector at the time the person is assisting. By definition an assisting person should only have the same powers exercised by the inspector at the time the person is assisting and any powers must be further limited to those that are necessary in order to do the specific assistance required.

Recommend change 'conferred on' to 'exercised by' and 'necessary in order to assist in that instance'.

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- (b) is subject to the same responsibilities as an inspector under this Part but is not required to give notice under section 89(4); and
- (c) has the same protection from liability as an inspector.
- (5) Nothing in this section derogates from the powers of a police officer.

90. Obtaining information, inspectors' powers as to

- (1) An inspector may direct ~~by notice in writing require~~
 - (a) the occupier of any premises from which there has been, is, or is likely to be, an emission, or onto which any waste has been or is being discharged, to produce to the inspector —
 - (i) any books or other sources of information relating to that emission or to any manufacturing, industrial or trade processes carried on at those premises; or
 - (ii) any data from any monitoring equipment or monitoring programme in respect of that emission;
 - or
 - (b) any person to produce to the inspector any books or other sources of information in the custody or possession of that person relating to —
 - (i) any emission; or
 - (ii) the manufacture, sale or distribution for sale of any prescribed equipment or material.~~material,~~~~and may take copies of or data or extracts from any books or other sources of information produced to him in compliance with such a requirement.~~
- (1Aa) An inspector may direct ~~require~~ a person to produce to the inspector any licence, registration, permit, approval, certificate

or authority granted and issued under this Act to the person or alleged by the person to have been so granted and issued.

(1B**b**) An inspector may —

(a) conduct such examination and inquiry as the inspector considers necessary to ascertain whether there has been compliance with the Act; and

(b) question any person to ascertain whether or not there has been compliance with this Act and direct that person to do either or both of the following —

(i) answer any question put to the person;

(ii) produce any books or other sources of information in the custody or possession of that person relating to compliance with the Act.

~~(b) question any person to ascertain whether or not there has been compliance with this Act and require that person to answer any question and, if the inspector considers it appropriate, to verify the answer by statutory declaration.~~

(1C) A direction given under subsection (1), (1A) or (1B)(b)(ii) —

(a) must be given in writing to the person required to produce the document, books or other sources of information or data; and

(b) must specify the time at, or within which, the document, books or other sources of information or data are to be produced to the inspector; and

(c) may require that the document, books or other sources of information or data to be produced to the inspector —

(i) at a place specified in the direction; and

(ii) by a means specified in the direction.

(1D) A direction under subsection (1B)(b)(i) —

(a) may be given orally or in writing; and

(b) must specify the time at, or within which, the answer must be given to the inspector; and

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- (c) may require any of the following —
- (i) that the answer be given orally or in writing;
 - (ii) if the answer is directed to be given in writing, be given by means specified in the direction;
 - (iii) that the answer be verified by a statutory declaration.
- (2) A person who does not comply with a direction given to the person ~~requirement made to him~~ under subsection (1), (1aA) or (1bB) commits an offence.
- (3) An inspector may examine and take copies of or data or extracts from, or download or print out, any books or other sources of information or data produced to the inspector in compliance with a direction under this section.
- (4) An inspector may record an answer given orally under this section, including by making an audiovisual recording.

[Section 90 amended: No. 14 of 1998 s. 11 and 33; No. 54 of 2003 s. 58; No. 60 of 2003 s. 100 (as amended: No. 40 of 2005 s. 13(6)).]

91. Entry powers of inspectors for s. 86

- (1) An inspector may at any reasonable time enter any premises used wholly or principally for or in connection with —
- (a) the manufacture, assembly, supply, distribution, storage or sale of any new equipment or any vehicle or vessel to which section 86(1) applies; or
 - (b) the sale of any equipment to which section 86(2) applies,
- for the purpose of determining whether or not that equipment, vehicle or vessel complies with any requirement made by or under this Act and may for that purpose make any inspection, measurement or test in respect of any such equipment, vehicle or vessel in or on those premises.
- (2) When a vehicle or vessel is in or on any premises for the purposes of maintenance or repair to the vehicle or vessel and

the owner of the vehicle or vessel is not present at those premises with the vehicle or vessel, an inspector shall take all reasonable steps to notify that owner of ¹ his intention to make any inspection, measurement or test under subsection (1) of the vehicle or vessel before doing so.

- (3) A person who sells any new equipment or any vehicle or vessel to which section 86(1) applies or any equipment to which section 86(2) applies or any other vehicle or vessel and who prevents an inspector from buying any such equipment, vehicle or vessel for the purpose of making any inspection, measurement or test to determine whether or not it complies with any requirement made by or under this Act commits an offence.

91A. Stopping etc. vehicles and vessels, powers of inspectors and authorised persons as to

- (1) An inspector or an authorised person may at any time stop, enter, search and inspect any vehicle or vessel if ² has reasonable grounds for believing that an offence under this Act is being, has been or is likely to be committed.
- (2) A person who, being in charge of a vehicle or vessel, fails to stop the vehicle or vessel when so required by a person who makes ³ himself known as being an inspector or an authorised person commits an offence.

[Section 91A inserted: No. 48 of 2010 s. 8.]

92. Inspectors may require details of certain occupiers and others

- (1) An inspector may by notice in writing require any person who appears to the inspector to be the occupier of any premises —
- (a) on or from which there has been, is, or is likely to be, an emission; or
 - (b) on which any waste is being or is likely to be stored; or

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Change 'his' to 'their' or 'his / her'

 Number: 2 Author: CME WA Subject: Highlight Date: 17/01/2020
9:35:27 AM

Change 'he' to 'he / she' or 'they'

 Number: 3 Author: CME WA Subject: Highlight Date: 13/01/2020
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Change 'himself' to 'themselves' or 'himself / herself'

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- (c) at or from which prescribed equipment or material is manufactured, sold or distributed for sale,
- to furnish to the inspector orally or, if so requested in that notice, in writing the name and address of any person who on a date specified in that notice was the occupier of those premises or any part thereof so specified or was in control of any equipment, trade, process, activity or material in those premises so specified.
- (2) An inspector who finds a person committing an offence or who on reasonable grounds suspects that an offence has been committed or is about to be committed by a person may require the person —
- (a) to give the name and address of the person to the inspector; and
- (b) if the inspector suspects on reasonable grounds that a name or address so given is false, to produce evidence that the particulars are correct.
- (3) If a person fails or refuses to comply with a requirement under subsection (2)(a), or gives a name or address that the inspector reasonably believes to be false, the inspector may require the person to stay with the inspector until the person can be delivered to a police officer to be dealt with according to law and, for that purpose, may detain the person.
- (4) A person who —
- (a) does not comply with a requirement made under subsection (1), (2) or (3); or
- (b) gives a false name or address to an inspector,
- commits an offence.

[Section 92 amended: No. 14 of 1998 s. 12 and 34; No. 54 of 2003 s. 59.]


92A. Seizing evidence etc.

- (1) An inspector may seize any thing that the inspector suspects on reasonable grounds —
 - (a) is, or is intended to be, involved in the commission of an offence against this Act; or
 - (b) may afford evidence of the commission of such an offence.
- (2) As soon as practicable after the thing is seized, the inspector is to give a receipt for it to the person from whom it was seized.
- (3) If for any reason, it is not practicable to comply with subsection (2), the inspector is to —
 - (a) leave the receipt at the place of seizure; and
 - (b) ensure the receipt is left in a reasonably secure way and in a conspicuous position.
- (4) Nothing in this section restricts the power of an authorised person or police officer to seize equipment under section 81A.

[Section 92A inserted: No. 14 of 1998 s. 13.]

92B. Dealing with seized things

- (1) If any thing is seized under section 92A and, in the opinion of the CEO, the thing is likely to cause pollution or environmental harm or perish if no action is taken to deal with it, the CEO may sell, treat, preserve, destroy, dispose of or otherwise deal with the thing in the prescribed way.
- (2) Except as provided in subsection (3), proceeds of the sale of any thing under subsection (1) are to be paid into the **1** consolidated Account.
- (3) If —
 - (a) any thing is seized by an inspector in connection with a suspected offence; and
 - (b) the thing is sold under subsection (1); and

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Recommend update cost recovery mechanism.

s. 92C

- (c) a decision is subsequently made not to commence a prosecution in respect of the offence or, after the prosecution has been completed, no person is convicted of the offence,

the proceeds of the sale of the thing (less any costs and expenses incurred by the CEO in dealing with the thing) are to be paid to the person from whom the thing was seized.

- (4) The CEO may recover all costs and expenses incurred by the CEO in respect of action taken under subsection (1).
- (5) The costs and expenses referred to in subsection (4) may be —
 - (a) awarded by order under section 99Y; or
 - (b) recovered as a debt due from the owner of the thing or the person from whom the thing was seized in a court of competent jurisdiction, despite proceedings not having been taken for an offence involving the seized thing.

[Section 92B inserted: No. 14 of 1998 s. 13; amended: No. 54 of 2003 s. 60 and 140(2); No. 77 of 2006 s. 4.]

92C. Returning seized things

- (1) The CEO may at any time before a prosecution involving the thing seized is started authorise the return of the thing seized to its owner or person entitled to the possession of the thing or the person from whom the thing was seized.
- (2) The CEO may authorise the return of the thing on such conditions as the CEO thinks fit, including a condition that the person give security to the CEO for payment of the value of the thing if it is forfeited.
- (3) A person must not contravene a condition imposed under subsection (2).
- (4) If a court convicts a person of an offence against subsection (3), the court may, in addition to any penalty imposed under that subsection, order the person to pay compensation for any damage or loss caused by the offence to any person.

- (5) Subject to section 92B, subsection (1) and any order for forfeiture made under this Act, the CEO is to order the return of the seized thing to its owner or the person entitled to the possession of the thing or the person from whom the thing was seized at the end of —

- (a) 12 months from the time it was seized; or
- (b) if a prosecution for an offence involving the thing is started within that 12 months — the prosecution for the offence and any appeal from the prosecution.

[Section 92C inserted: No. 14 of 1998 s. 13; amended: No. 54 of 2003 s. 140(2).]

92D. Forfeiture of abandoned property

- (1) If any thing is seized under this Act and a person to whom the thing can be returned under section 92C cannot be found, the CEO is to give notice in the prescribed manner that the thing is being held by the Department and may be claimed by its owner.
- (2) If after the expiration of 3 months from the day on which notice has been given under subsection (1) the thing has not been claimed by its owner the thing is forfeited to the Crown.

[Section 92D inserted: No. 14 of 1998 s. 13; amended: No. 54 of 2003 s. 140(2).]

92E. Person not to interfere with seized things

- (1) A person must not remove, damage or interfere with any thing seized under this Act unless the person is authorised to do so by the CEO or an inspector.
- (2) If a court convicts a person of an offence against subsection (1), the court may, in addition to any penalty imposed under that subsection, order the person to pay compensation to the CEO or to any other person for any damage or loss caused by the offence.

[Section 92E inserted: No. 14 of 1998 s. 13; amended: No. 54 of 2003 s. 140(2).]

s. 92F

~~92F. Assistance to inspector~~

- ~~(1) An inspector may be assisted in the exercise of his or her powers under this Part by such persons as the inspector considers necessary.~~
- ~~(2) A person is not personally liable for any matter or thing done or omitted to be done in good faith by that person in the course of giving assistance to an inspector under subsection (1).~~
- ~~[Section 92F inserted: No. 14 of 1998 s. 13.]~~

92G. Inspector to try to minimise damage

In exercising any power under this Part, an inspector is to try, as far as is practicable, to minimise damage to any property.

[Section 92G inserted: No. 14 of 1998 s. 13.]

92H. Compensation for loss etc. due to enforcement action

- (1) A person who suffers loss or damage as a result of the exercise of —
- (a) the power of entry conferred on an inspector by section 89(1) or (3); or ~~section 89(3); or~~
 - (b) the powers in respect of seizure conferred on an inspector by section 92A or 92B,

may within one year of the exercise of that power apply to the CEO for compensation for that loss or damage.

- (2) No compensation is payable pursuant to an application under subsection (1) unless the CEO is of the opinion that, in the circumstances of the case, it is just to pay compensation.
- (3) The amount of compensation payable is to be determined by agreement between the person applying for that compensation and the CEO or, in default of any such agreement, by the Magistrates Court on the application of the person so applying or of the CEO.

[Section 92H inserted: No. 14 of 1998 s. 13; amended: No. 54 of 2003 s. 140(2); No. 59 of 2004 s. 141.]

93. **1 obstructing etc. inspectors or authorised persons**

A person who —

- (a) delays or obstructs a police officer, inspector or authorised person; or
- (b) does not comply with any reasonable requirement made by a police officer, inspector or authorised person; or
- (c) being the occupier of any premises, refuses to permit a police officer, inspector or authorised person to do anything on those premises,

in the exercise by the police officer, inspector or authorised person of any of 2 powers under this Act commits an offence.

94. **Analysts, appointment of**

- (1) The CEO may appoint analysts for the purpose of making analyses for the purposes of this Act.
- (2) The appointment of a person under subsection (1) does not —
 - (a) render Part 3 of the *Public Sector Management Act 1994*, or any other Act applying to persons as officers of the Public Service of the State, applicable to the person; or
 - (b) affect or prejudice the application to the person of any Act referred to in paragraph (a) if it applied to 3 at the time of 4 appointment.

[Section 94 amended: No. 32 of 1994 s. 19; No. 54 of 2003 s. 140(2).]

95. **CEO may require information about industrial processes etc.**

- (1) The CEO may, if he has reason to believe that any requirement made by or under this Act is not being complied with in respect of any premises, by notice in writing served on the occupier of the premises require that occupier to furnish to the CEO within such period, being a period of not less than 14 days from the day

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CME would like further clarity on how this will interact with the requirements of the MSIA. Mine site personnel may be exercising their requirements and duties under the MSIA and this may not always align with what police officer, inspector or authorised person requests or may cause a delay etc. For example, they may refuse and obstruct entry inside a blast zone due to a loaded and imminent shot. It will not always be the case that police officers, inspectors and authorised persons will be familiar with hazards associated with the resources sector, nor may they be familiar with the MSIA etc.

Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020
1:58:27 PM

Change 'his' to 'their' or 'his / her'

Number: 3 Author: CME WA Subject: Highlight Date: 17/01/2020
9:35:52 AM

Change 'him' to 'him / her' or 'them'

Number: 4 Author: CME WA Subject: Highlight Date: 13/01/2020
1:58:35 PM

Change 'his' to 'their' or 'his / her'

s. 96

on which that notice was served, as is specified in that notice such information concerning —

- (a) any manufacturing, industrial or trade process carried on in or on those premises; or
- (b) any waste or noise, odour or electromagnetic radiation which has been, is being or is likely to be emitted from, or any waste which is being or is likely to be stored on, those premises,

as is specified in that notice.

- (2) Any person who does not comply with any requirement made to **1m** under subsection (1) commits an offence.

[Section 95 amended: No. 54 of 2003 s. 61 and 140(2).]

96. CEO may require information about vehicles or vessels

- (1) Subject to subsection (2), the CEO may by notice in writing served on any person —
 - (a) who constructs, manufactures, assembles or sells any new vehicle or vessel; and
 - (b) who may reasonably be expected to be in possession of any information relating to any emission from vehicles or vessels, including information —
 - (i) relating to any such emission obtained by the use of any equipment; or
 - (ii) required by the CEO for the making of any inspection, measurement or test of any such emission by a prescribed method,

require that person to furnish the information referred to in paragraph (b) to the CEO within such period, being a period of not less than 14 days from the day on which that notice was served, as is specified in that notice.

- (2) The CEO may at the request of a person on whom a notice is served under subsection (1) extend by notice in writing served on that person the period within which the relevant information

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9:36:00 AM

Change 'him' to 'him / her' or 'them'

is required to be furnished to the CEO, and the notice served on that person under subsection (1) is thereupon deemed to be amended accordingly.

- (3) A person who does not comply with a requirement made to ^{1m} under subsection (1) commits an offence.

[Section 96 amended: No. 57 of 1997 s. 54(4); No. 54 of 2003 s. 62 and 140(2).]

97. CEO may require vehicles, vessels and equipment to be made available for testing

- (1) The CEO may by notice in writing served on any person who —
- (a) is the owner of or apparently in lawful possession of any vehicle or vessel; or
 - (b) is the occupier of any premises referred to in section 91 and who has in ^{2s} possession any equipment to which section 86(2) applies,

require that person to make that vehicle, vessel or equipment available within the period specified in that notice for the making of any inspection, measurement or test to determine whether or not that vehicle, vessel or equipment complies with any requirement made by or under this Act.

- (2) A person who does not comply with a requirement made to ^{3m} under subsection (1) commits an offence.

[Section 97 amended: No. 54 of 2003 s. 140(2).]

98. Police officers' powers for inspecting etc. vehicles and vessels

A police officer may for the purposes of inspecting, measuring or testing a vehicle or vessel to ascertain whether or not it complies with any requirement made by or under this Act remove or cause to be removed the vehicle or vessel to a place where that inspecting, measuring or testing can be or is carried out.

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9:36:06 AM

Change 'him' to 'him / her' or 'them'

 Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020
1:58:44 PM

Change 'his' to 'their' or 'his / her'

 Number: 3 Author: CME WA Subject: Highlight Date: 17/01/2020
9:36:11 AM

Change 'him' to 'him / her' or 'them'

s. 99

99. Police officers may stop audible alarms

- (1) If a police officer is satisfied that an alarm —
- (a) has been sounding in or on any premises or a vehicle for not less than such period as is prescribed; and
 - (b) is emitting unreasonable noise,
- he may —
- (c) enter the premises or vehicle referred to in paragraph (a); and
 - (d) take all such steps as appear to ^{1m} to be reasonably necessary for or in connection with stopping the alarm from sounding,
- with the aid of such assistants as he considers necessary and with the use of reasonable force.
- (2) A police officer who has exercised the powers conferred on ^{2m} by subsection (1) shall cause such persons or public authorities as appear to ^{3m} to be appropriate in the circumstances to be informed promptly of that exercise.
- (3) The CEO shall pay to an assistant referred to in subsection (1) the amount of any reasonable fee charged by that assistant in respect of aid rendered by that assistant under that subsection.

~~—(4) The amount of a fee paid by the CEO under subsection (3) constitutes a debt due to the Crown by the owner of the premises in respect of which the aid to which that fee relates was rendered and may be recovered by the CEO from that owner in a court of competent jurisdiction and, if so recovered, shall be credited to the Consolidated Account.~~

[Section 99 amended: No. 6 of 1993 s. 11; No. 49 of 1996 s. 64; No. 57 of 1997 s. 54(5) and (6); No. 54 of 2003 s. 128 and 140(2); No. 77 of 2006 s. 4.]


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 Number: 1 Author: CME WA Subject: Highlight Date: 17/01/2020 9:36:20 AM

Change 'him' to 'him / her' or 'them'

 Number: 2 Author: CME WA Subject: Highlight Date: 17/01/2020 9:36:27 AM

Change 'him' to 'him / her' or 'them'

 Number: 3 Author: CME WA Subject: Highlight Date: 17/01/2020 9:36:38 AM

Change 'him' to 'him / her' or 'them'

Part VIA — Legal proceedings and penalties

[Heading inserted: No. 14 of 1998 s. 14.]

1 Division 1 — Prescribed offences and modified penalties

~~Division 1 — Tier 2 offences and modified penalties~~

~~[Heading inserted: No. 14 of 1998 s. 14.]~~

99AA. Term used: prescribed offence

In this Division —

prescribed offence means —

- (a) a Tier 1 offence under a section listed in the Table; or
- (b) a Tier 2 offence.

Table

| | |
|---------------------------|--------------------------|
| s. 6(7) | s. 47(1) |
| s. 47(4) | s. 48(6) |
| s. 49(3) | s. 50(2) |
| s. 50A(2) | s. 51C |
| s. 69(5) | s. 71(5) |

99A. Modified penalty notice, issue of

(1) This section applies to a person if the CEO is of the opinion that —

- (a) the person has committed a prescribed offence; and
- (b) there is sufficient evidence to support the allegation of the offence; and
- (c) having regard to the nature and particulars of the alleged offence and to the particulars of the circumstances

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CME has some concerns with the proposed amendments. It does not appear that the CEO needs to lay out concerns to an evidentiary standard for modified penalties which, combined with the low threshold and changes to licences to, eg: require express listing of all emissions, may create issues.

It will be disproportionately expensive to challenge matters given the severity of the penalty and reputational impact of the penalty which may in fact be for an immaterial matter due to the low threshold.

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Division 1 Tier 2 offences and modified penalties
s. 99A

relating to the alleged offence, the alleged offence can adequately be dealt with under this Division.

(1A) For the purposes of subsection (1)(c), the CEO must have regard to —

- (a) the potential or actual impact on the environment of any occurrence giving rise to the allegation of the offence; and
- (b) in the case of a prescribed offence other than an offence under section 49A(2) or (3), whether, as soon as was reasonably practicable after the occurrence giving rise to the allegation of the offence, the alleged offender notified particulars of the occurrence in writing to the CEO; and
- (c) in the case of a prescribed offence other than an offence under section 49A(2) or (3), whether, after the occurrence giving rise to the allegation of the offence, the alleged offender took all reasonable and practicable steps to minimise and remedy any adverse environmental effects of that occurrence; and
- (d) whether the alleged offender cooperated with officers and employees of the Department and provided information and assistance when so requested; and
- (e) whether the alleged offender has taken reasonable steps to ensure that the circumstances giving rise to the allegation of the offence do not reoccur.

~~— (1) This section applies to a person if —~~

- ~~(a) the CEO is of the opinion that —~~
 - ~~(i) the person has committed a Tier 2 offence; and~~
 - ~~(ii) there is sufficient evidence to support the allegation of the offence;~~

~~— and~~

~~— [b) deleted]~~

- ~~(c) in the case of a Tier 2 offence other than an offence against section 49A(2) or (3), as soon as was reasonably~~

~~practicable after the occurrence giving rise to the allegation of the offence, the alleged offender notified particulars of the occurrence in writing to the CEO; and~~

- ~~—— (d) in the case of a Tier 2 offence other than an offence against section 49A(2) or (3), after the occurrence giving rise to the allegation of the offence, the alleged offender took all reasonable and practicable steps to minimise and remedy any adverse environmental effects of that occurrence; and~~
- ~~—— (e) the alleged offender cooperated with officers and employees of the Department and provided information and assistance when so requested; and~~
- ~~—— (f) the alleged offender has taken reasonable steps to ensure that the circumstances giving rise to the allegation of the offence do not reoccur; and~~
- ~~—— (g) having regard to the nature and particulars of the alleged offence and to the particulars of the circumstances relating to the alleged offence, the alleged offence can adequately be dealt with under this Division.~~

(2) If the CEO makes a determination that a person alleged to have committed a prescribed Tier 2 offence is a person to whom this section applies, the CEO is to —

- (a) issue a certificate —
 - (i) stating the determination; and
 - (ii) specifying how the criteria in subsection (1) on which the determination was made were met;
- and
- (b) give a modified penalty notice, and the certificate referred to in paragraph (a), to the person.

(3) A modified penalty notice may be served personally or by registered post.

(4) A determination by the CEO that a person is, or is not, a person to whom this section applies, or the fact that the CEO has not made such a determination, cannot be the subject of appeal or

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s. 99B

judicial review or otherwise be called in question in any proceedings.

[Section 99A inserted: No. 14 of 1998 s. 14; amended: No. 54 of 2003 s. 129 and 140(2); No. 48 of 2010 s. 9.]

99B. Content of modified penalty notice

- (1) A modified penalty notice is to be in the prescribed form and is to —
 - (a) contain a description of the alleged offence; and
 - (b) advise that if the alleged offender does not wish to be prosecuted for the alleged offence in a court, the amount of money specified in the notice as being the modified penalty for the offence may be paid to a designated person within a period of 28 days after the service of the notice; and
 - (c) inform the alleged offender as to who are designated persons for the purposes of receiving payment of modified penalties.
- (2) In a modified penalty notice the amount specified as the modified penalty for the alleged offence referred to in the notice is to be the amount that was —
 - (a) if the alleged offender has not previously been convicted of an offence of that kind and has not previously paid a modified penalty under this Division in respect of an alleged offence of that kind, 10% of the maximum fine that could be imposed for that offence by a court; and
 - (b) if the alleged offender has previously been convicted of an offence of that kind, or has previously paid a modified penalty under this Division in respect of an alleged offence of that kind, 20% of the maximum fine that could be imposed for that offence by a court,

at the time the alleged offence is believed to have been committed.

- (3) The CEO may, in writing, appoint persons or classes of persons to be designated persons for the purposes of this section.

[Section 99B inserted: No. 14 of 1998 s. 14; amended: No. 54 of 2003 s. 140(2); No. 84 of 2004 s. 80.]

99C. Extending time to pay modified penalty

The CEO may, in a particular case, extend the period of 28 days within which the modified penalty may be paid and the extension may be allowed whether or not the period of 28 days has elapsed.

[Section 99C inserted: No. 14 of 1998 s. 14; amended: No. 54 of 2003 s. 140(2).]

99D. Withdrawing modified penalty notice

- (1) Within one year after a modified penalty notice was given to an alleged offender in respect of an offence the CEO may, if —

- (a) the CEO is no longer of the opinion that the alleged offender is a person to whom section 99A applies in respect of that offence; and
- (b) the modified penalty has not been paid,

withdraw the modified penalty notice by sending to the alleged offender a notice in the prescribed form stating that the modified penalty notice has been withdrawn.

- (2) A notice under this section may be served personally or by registered post.

[Section 99D inserted: No. 14 of 1998 s. 14; amended: No. 54 of 2003 s. 140(2).]

99E. Consequence of paying modified penalty

- (1) Subsections (2) and (3) apply if the modified penalty specified in a modified penalty notice has been paid within 28 days or such further time as is allowed.

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Division 1 Tier 2 offences and modified penalties

s. 99F

- (2) If this subsection applies it prevents the bringing of proceedings and the imposition of penalties to the same extent that they would be prevented if the alleged offender had been convicted by a court of, and punished for, the alleged offence.

(3) If this subsection applies, the CEO must publish —

(a) a notice of payment of the modified penalty; and

(b) such particulars as are prescribed.

~~(3) If this subsection applies, the CEO is to publish a notice of payment of the modified penalty, and such particulars as are prescribed, in —~~

~~(a) the annual report of the Department prepared for the purposes of Part 5 of the *Financial Management Act 2006*; and~~

~~(b) a daily newspaper circulating throughout the State.~~

- (4) Payment of a modified penalty is not to be regarded as an admission for the purposes of any proceedings, whether civil or criminal.

[Section 99E inserted: No. 14 of 1998 s. 14; amended: No. 54 of 2003 s. 140(2); No. 77 of 2006 Sch. 1 cl. 59(1).]

99F. Register of modified penalty notices etc.

- (1) The CEO is to maintain a register of —

(a) certificates and modified penalty notices issued under section 99A(2); and

(b) withdrawal forms sent under section 99D; and

(c) such particulars in relation to modified penalty notices and payments as the CEO considers appropriate or as are prescribed.

- (2) The register is to be available for public inspection under such conditions and at such places and times as are prescribed.

[Section 99F inserted: No. 14 of 1998 s. 14; amended: No. 54 of 2003 s. 140(2).]

99G. Application of penalties collected

An amount paid as a modified penalty is to be dealt with as if it were a fine imposed by a court as a penalty for an offence.

[Section 99G inserted: No. 14 of 1998 s. 14.]

Division 2 — Infringement notice offences

[Heading inserted: No. 14 of 1998 s. 14.]

99H. Terms used

In this Division —

designated person, in section 99K, 99M or 99N, means a person appointed under section 99I to be a designated person for the purposes of the section in which the term is used;

infringement notice offence means a Tier 3 offence, or an offence against the regulations, that is prescribed ~~by the regulations~~ for the purposes of this Division.

[Section 99H inserted: No. 14 of 1998 s. 14.]

99I. Designated persons for s. 99K, 99M or 99N, appointment of

- (1) The CEO may, in writing, appoint persons or classes of persons to be designated persons for the purposes of section 99K, 99M or 99N or for the purposes of 2 or more of those sections.
- (2) A person who is authorised to give infringement notices under section 99J is not eligible to be a designated person for the purposes of section 99K, 99M or 99N.

[Section 99I inserted: No. 14 of 1998 s. 14; amended: No. 54 of 2003 s. 140(2).]

99J. Infringement notice, issue of

- (1) An inspector or, in the case of an alleged infringement notice offence in respect of which a prosecution may be instituted by a police officer without the consent of the CEO, a police officer who has reason to believe that a person has committed an

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Division 2 Infringement notice offences

s. 99K

infringement notice offence ~~may give~~ ~~may, within 35 days after~~
~~the alleged offence is believed to have been committed, give~~ an
infringement notice to the alleged offender.

- (2) An infringement notice may be served personally or by registered post.

- (3) The infringement notice must be served within 1 months after the day on which the alleged infringement notice offence is believed to have been committed.

[Section 99J inserted: No. 14 of 1998 s. 14; amended: No. 54 of 2003 s. 130.]

99K. Content of infringement notice

- (1) An infringement notice is to be in the prescribed form and is to —
- (a) contain a description of the alleged offence; and
 - (b) advise that if the alleged offender does not wish to be prosecuted for the alleged offence in a court, the amount of money specified in the notice as being the modified penalty for the offence may be paid to a designated person within a period of 28 days after the service of the notice; and
 - (c) inform the alleged offender as to who are designated persons for the purposes of receiving payment of modified penalties.
- (2) In an infringement notice the amount specified as the modified penalty for the offence referred to in the notice is to be the amount that was the prescribed modified penalty at the time the alleged offence is believed to have been committed.
- (3) The modified penalty that may be prescribed for an infringement notice offence is not to exceed —
- (a) if the alleged offender has not previously been convicted of an offence of that kind and has not previously paid a modified penalty under this Division in respect of an

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📄 Number: 1 Author: CME WA Subject: Highlight Date: 16/01/2020
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Increasing from 35 days to 12 months is a large increase. Can you please confirm the rationale? Timely resolution is preferable.

alleged offence of that kind, 10% of the maximum fine that could be imposed for that offence by a court; and

- (b) if the alleged offender has previously been convicted of an offence of that kind, or has previously paid a modified penalty under this Division in respect of an alleged offence of that kind, 20% of the maximum fine that could be imposed for that offence by a court.

[Section 99K inserted: No. 14 of 1998 s. 14; amended: No. 54 of 2003 s. 131; No. 84 of 2004 s. 80.]

99L. Some prior convictions and payments of modified penalties to be disregarded for s. 99K(3)

For the purposes of section 99K(3), a prior conviction or payment of a modified penalty in respect of an alleged offence is not to be taken into account for the purposes of determining whether the alleged offender has previously been convicted of an offence or has previously paid a modified penalty notice unless —

- (a) the prior conviction was recorded within the period of 5 years immediately prior to the giving of an infringement notice in respect of the present alleged offence; or
- (b) the modified penalty was paid in respect of the prior alleged offence within the period of 5 years immediately prior to the giving of an infringement notice in respect of the present alleged offence.

[Section 99L inserted: No. 14 of 1998 s. 14.]

99M. Extending time to pay modified penalty

A designated person may, in a particular case, extend the period of 28 days within which the modified penalty may be paid and the extension may be allowed whether or not the period of 28 days has elapsed.

[Section 99M inserted: No. 14 of 1998 s. 14.]

99N. Withdrawing infringement notice

- (1) Within one year after the notice was given a designated person may, whether or not the modified penalty has been paid, withdraw an infringement notice by sending to the alleged offender a notice in the prescribed form stating that the infringement notice has been withdrawn.
- (2) If an infringement notice is withdrawn after the modified penalty has been paid, the amount is to be refunded.
- (3) A notice under this section may be served personally or by registered post.

[Section 99N inserted: No. 14 of 1998 s. 14.]

99O. Consequence of paying modified penalty

- (1) Subsection (2) applies if the modified penalty specified in an infringement notice has been paid within 28 days or such further time as is allowed and the notice has not been withdrawn.
- (2) If this subsection applies it prevents the bringing of proceedings and the imposition of penalties to the same extent that they would be prevented if the alleged offender had been convicted by a court of, and punished for, the alleged offence.
- (3) Payment of a modified penalty is not to be regarded as an admission for the purposes of any proceedings, whether civil or criminal.

[Section 99O inserted: No. 14 of 1998 s. 14.]

99P. Application of penalties collected

An amount paid as a modified penalty is, subject to section 99N(2) —

- (a) if issued by an inspector employed by a local government, to be paid to the local government; and
- (b) otherwise, to be dealt with as if it were a fine imposed by a court as a penalty for an offence.

[Section 99P inserted: No. 14 of 1998 s. 14.]

Division 3 — Penalties

[Heading inserted: No. 14 of 1998 s. 14.]

99Q. Penalties

- (1) An individual who is convicted of an offence under a section specified in —
- (a) column 2 of Division 1 of Part 1 of Schedule 1; or
 - (b) column 2 of Division 1 of Part 2 of Schedule 1,
- is liable to a penalty not exceeding the penalty specified opposite to that section in column 3 of that Division.
- (2) A body corporate which is convicted of an offence under a section specified in —
- (a) column 2 of Division 2 of Part 1 of Schedule 1; or
 - (b) column 2 of Division 2 of Part 2 of Schedule 1,
- is liable to a penalty not exceeding the penalty specified opposite to that section in column 3 of that Division.
- (3) A person, being either an individual or a body corporate, who or which is convicted of an offence under a section specified in —
- (a) column 2 of Division 3 of Part 2 of Schedule 1; or
 - (b) column 2 of Part 3 of Schedule 1,
- is liable to a penalty not exceeding the penalty specified opposite to that section in column 3 of that Division or Part.

[Section 99Q inserted: No. 14 of 1998 s. 14.]

99R. Daily penalty

- (1) Without limiting section 71 of the *Interpretation Act 1984*, where an offence is committed by a person by reason of the contravention of a provision of this Act under which the person is required or directed to do any act or thing, or to refrain from doing any act or thing, that offence is taken to continue so long as the act or thing so required or directed remains undone, or continues to be done, as the case may be.

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Division 3 Penalties

s. 99S

- (2) In addition to a penalty specified in column 3 of Schedule 1, a person, being either an individual or a body corporate, who or which is convicted of an offence under a section specified in column 2 of any Part of Schedule 1 is liable to a daily penalty not exceeding the daily penalty specified opposite to that section in column 4 of the Part for each day or part of a day during which the offence continues after written notice of the alleged offence has been given by the CEO to the offender.
- (3) In addition to a penalty specified in column 3 of Schedule 1, a person, being either an individual or a body corporate, who or which is convicted of an offence under a section specified in column 2 of any Part of Schedule 1 is liable to a daily penalty not exceeding the daily penalty specified opposite to that section in column 4 of the Part for each day or part of a day during which the offence continues after the offender is convicted.

[Section 99R inserted: No. 14 of 1998 s. 14; amended: No. 54 of 2003 s. 140(2).]

99S. Attempt and accessory after the fact

A person who attempts to commit, or becomes an accessory after the fact to, an offence (in this section called the **principal offence**) commits —

- (a) if the principal offence is a Tier 1 offence, a Tier 1 offence;
- (b) if the principal offence is a Tier 2 offence, a Tier 2 offence;
- (c) if the principal offence is a Tier 3 offence, a Tier 3 offence,

and is liable on conviction, unless the Act specifies otherwise, to the penalty to which a person convicted of the principal offence is liable.

[Section 99S inserted: No. 14 of 1998 s. 14.]

Division 4 — Additional powers available to the court

[Heading inserted: No. 14 of 1998 s. 14.]

99T. Term used: convicted

For the purposes of this Division —

- (a) **convicted** has the same meaning as in the *Sentencing Act 1995*; and
- (b) a person is convicted of an offence notwithstanding that a spent conviction order is made under section 39 of the *Sentencing Act 1995* in respect of the conviction.

[Section 99T inserted: No. 14 of 1998 s. 14.]

99U. Orders generally

- (1) One or more orders may be made under this Division against a person convicted of an offence against this Act.
- (2) Orders may be made under this Division in addition to any penalty that may be imposed in relation to the offence.
- (3) Orders made under this Division in relation to an offence are not limited by the monetary penalty that may be imposed in respect of the offence.
- (4) Nothing in this Division limits the court's powers under the *Sentencing Act 1995* or the *Criminal Property Confiscation Act 2000*.

[Section 99U inserted: No. 14 of 1998 s. 14; amended: No. 69 of 2000 s. 13(1).]

99V. Orders for forfeiture

- (1) If a court convicts a person of an offence against this Act, the court may, in addition to any other penalty imposed under this Act, order the forfeiture to the Crown of any thing used, or intended to be used, in the commission of the offence.

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- (2) A court is not to make an order for the forfeiture of any thing under subsection (1) unless the prosecutor applies for the order.
- (3) If a thing is forfeited to the Crown, any security given to the CEO under section 92C in lieu of the thing is taken to be forfeited to the Crown in lieu of the thing.

[Section 99V inserted: No. 14 of 1998 s. 14; amended: No. 54 of 2003 s. 140(2).]

99W. Disposal of forfeited things

- (1) Any thing forfeited to the Crown under this Act may be sold, destroyed or otherwise disposed of or dealt with in the prescribed way.
- (2) Proceeds of the sale of any thing forfeited to the Crown under this Act are to be paid into the **1**nsolidated Account.
- (3) If the thing is not sold, or if the proceeds of the sale are insufficient to defray the costs and expenses of seizing, storing, treating, selling, destroying, disposing of or otherwise dealing with the thing and an order for costs or expenses incurred in respect of the thing has not been made under section 99Y(1)(a)(i) —
 - (a) those costs and expenses or the unsatisfied balance of them; and
 - (b) the costs of and incidental to the proceedings for recovery from the former owner,

may be recovered from the offender as a debt due in a court of competent jurisdiction.

[Section 99W inserted: No. 14 of 1998 s. 14; amended: No. 77 of 2006 s. 4.]

Number: 1 Author: CME WA Subject: Highlight Date: 17/01/2020
9:22:31 AM

Recommend update cost recovery mechanism.

99X. Orders for prevention, restoration etc.

- (1) If a court convicts a person of an offence against this Act, the court may order the offender to take such steps as are specified in the order, within such time as is so specified (or such further time as the court on application may allow) —
 - (a) to prevent, control, abate or mitigate any harm to the environment caused by the commission of the offence; or
 - (b) to make good any resulting environmental damage; or
 - (c) to prevent the continuance or recurrence of the offence.
- (2) A court is not to make an order under subsection (1) unless the prosecutor applies for the order.
- (3) The court may, in an order under this section, impose any other requirements the court considers necessary or expedient for enforcement of the order.
- (4) A person who without lawful excuse, proof of which is on the person, does not comply with an order under this section commits an offence punishable after summary conviction by the court that imposed the order.
- (5) If a court convicts a person under subsection (4) of failing to comply with an order, the court may order that the act required to be done may be done so far as is practicable by the CEO, or some other person appointed by the court, at the cost of the offender.
- (6) Expenses and costs incurred, or to be incurred, by a person under an order under subsection (5) are to be ascertained in such manner as the court may direct and are to be paid by, or recovered from, the offender in such manner as the court orders.

[Section 99X inserted: No. 14 of 1998 s. 14; amended: No. 54 of 2003 s. 140(2).]

99Y. Orders for costs, expenses and compensation

- (1) If a court convicts a person of an offence against this Act, the court may, if it appears to the court that —
- (a) the CEO or a public authority has reasonably incurred costs and expenses in connection with —
 - (i) seizing, storing, treating, selling, destroying, disposing of or otherwise dealing with a thing seized under this Act in relation to the offence; or
 - (ii) the prevention, control, abatement or mitigation of any harm to the environment caused by the commission of the offence; or
 - (iii) making good any resulting environmental damage;
 - or
 - (b) a person (including a public authority) has, by reason of the commission of the offence, suffered loss of or damage to property or has reasonably incurred costs and expenses in preventing or mitigating, or in attempting to prevent or mitigate, any such loss or damage,

order the offender to pay to the CEO, public authority or person the reasonable costs and expenses so incurred, or compensation for the loss or damage so suffered, as the case may be, in such amount as does not exceed the prescribed amount and is fixed by the order.

- (2) The court may make an order under subsection (1) at the time of imposing a penalty for the offence or upon application at a later time.

[Section 99Y inserted: No. 14 of 1998 s. 14; amended: No. 54 of 2003 s. 140(2).]

99Z. Orders regarding monetary benefits

- (1) If a court convicts a person of any offence against this Act, the court may order the offender to pay an additional penalty of an amount not exceeding the court's estimation of the amount of any monetary benefits acquired by the offender, or accrued or accruing to the offender, as a result of the commission of the offence.

- (2) In this section —

monetary benefits means —

(a) monetary, financial or economic benefits of any kind; and

(b) monetary savings, or a reduction in expenditure, achieved by the avoidance of charges, fees or other costs that would have been incurred by the offender if the offender had not committed the offence.

~~**monetary benefits means monetary, financial or economic benefits acquired by the avoidance of charges, fees or other costs which would have been incurred by the offender if the offender had not committed the offence.**~~

[Section 99Z inserted: No. 14 of 1998 s. 14.]

99ZA. Orders requiring public notice to be given etc.

- (1) If a court convicts a person of any offence against this Act, the court may do any one or more of the following —
- (a) order the offender to take specified action to publicise the offence and its environmental and other consequences and any other orders made against the person;
 - (b) order the offender to take specified action to notify specified persons or classes of persons of the offence and its environmental and other consequences and of any orders made against the person (including, for example, the publication in an annual report or any other notice to shareholders of a company or the notification

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of persons aggrieved or affected by the offender's conduct);

- (c) order the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit.
- (2) The court is not to make an order under subsection (1)(c) unless the prosecutor applies for the order.
- (3) The court may, in an order under this section, fix a period for compliance and impose any other requirements the court considers necessary or expedient for enforcement of the order.
- (4) If the offender fails to comply with an order under subsection (1)(a) or (b), the CEO may take action to carry out the order as far as may be practicable, including action to publicise or notify —
 - (a) the original contravention, its environmental and other consequences, and any other penalties imposed on the offender; and
 - (b) the failure to comply with the order.
- (5) The reasonable cost of taking action referred to in subsection (4) is recoverable by the CEO as a debt due in a court of competent jurisdiction.

[Section 99ZA inserted: No. 14 of 1998 s. 14; amended: No. 54 of 2003 s. 140(2).]

99ZB. Enforcing orders to pay moneys

- (1) If —
 - (a) the court orders the payment of moneys under this Division; and
 - (b) the amount payable under the order is not paid within 28 days after the date of the order,
- the amount may be recovered as a judgment debt in a court of competent jurisdiction, unless an order is made under subsection (2).

- (2) If the order is made by the Supreme Court or the District Court, that court may in addition make an order under section 59 of the *Sentencing Act 1995* and for that purpose that section, with any necessary changes, applies as if the order were a fine imposed on the offender.
- (3) For the purposes of subsection (1), a certified copy of an order is on request to be issued (without payment of a fee) to the CEO and the copy may be registered (without payment of a fee) as a judgment in a court of competent jurisdiction.

[Section 99ZB inserted: No. 14 of 1998 s. 14; amended: No. 54 of 2003 s. 140(2).]

Division 5 — Injunctions

99ZC. Injunctions to prevent improper conduct

(1) In this section —

contravention includes the continuation of a contravention;

court means the Supreme Court;

improper conduct means an act or omission constituting a contravention of, or involvement in a contravention of, section 41A(1), 47(1) or (4), 49(2), (3), (4) or (5), 50(1) or (2), 50A(1) or (2), 50B(1) or (2), 51C, 51J(1), 53A, 53B, 62 or 63(3);

involvement in a contravention means —

(a) aiding, abetting, counselling, or procuring the contravention; or

(b) inducing the contravention, whether by threats or promises or otherwise; or

(c) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) conspiring with others to effect the contravention; or

(e) attempting to do anything constituting involvement in a contravention under paragraph (a), (b), (c) or (d).

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- (2) Without limiting any other power the court may have to grant injunctive relief, it is declared that the court may grant an injunction to prevent a person from engaging in improper conduct (a **conduct injunction**).
- (3) The CEO may apply for a conduct injunction.
- (4) If the court is satisfied that it would be appropriate to grant a conduct injunction, the injunction may be granted —

 - (a) whether or not it is proved that the person intends to engage, or to engage again, or to continue to engage, in improper conduct of the kind sought to be prevented by the injunction; and
 - (b) whether or not the person has previously engaged in improper conduct of that kind.
- (5) An interim conduct injunction may be granted before final determination of an application for a conduct injunction.
- (6) The court must not require, as a condition of granting an interim conduct injunction, that an undertaking be given as to damages or costs.
- (7) The taking of proceedings against any person for an offence under this Act is not affected by —

 - (a) the making of an application for a conduct injunction; or
 - (b) the grant or refusal of a conduct injunction or an interim conduct injunction; or
 - (c) the rescission, variation or expiry of a conduct injunction or an interim conduct injunction.

Part VII — Appeals**100. Appeals against Authority's decisions etc. as to proposals and schemes**

- (1) Any decision-making authority, responsible authority, proponent or other person that disagrees with —
- (a) a recorded decision of the Authority that a proposal is not to be assessed, other than a decision that includes a recommendation that the proposal be dealt with under Part V Division 2; or
 - [(b), (c) deleted]*
 - (d) the content of, or any recommendation in, the report prepared under section 44 in respect of a proposal; or
 - (e) the content of, or any recommendation in, the report prepared under section 48D in respect of a scheme,
- may lodge with the Minister an appeal in writing setting out the grounds of the appeal.

- (1a) In subsection (1) —
recorded means set out in a public record under section 39(1).

[(2) deleted]

- (3) Any proponent that disagrees with any conditions or procedures agreed under section 45(1C) or (1D) (or under section 45(1C) or (1D) as applied by section 46(8)) may lodge with the Minister an appeal in writing setting out the grounds of that appeal.

- (3a) An appeal may be lodged —

- (a) under subsection (1)(a), within ~~14~~21 days of the making available of the public record; or
- (b) under subsection (1)(d), within ~~14~~21 days of the publication of the report under section 44(3)(a); or
- (c) under subsection (1)(e), within ~~14~~21 days of the publication of the report under section 48D(3)(a); or

[(d) deleted]

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Recommend provide express power to compel public authorities or other DMAs to respond within a specified timeframe or as otherwise agreed in writing.

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- (e) ¹der subsection (3), within ² days after the publication of the statement under section 45(5)(b) (or under section 45(5)(b) as applied by section 46(8)) of the statement setting out the agreement.

- (4) A proponent who is aggrieved by —

- (a) an order served on ³m under section 48(4)(b); or
(b) the taking of any steps under section 48(4)(c) or (d),

may, within ⁴ days of the service of that order or the taking of the last of those steps, as the case requires, lodge with the Minister an appeal in writing setting out the grounds of that appeal.

[Section 100 amended: No. 73 of 1994 s. 4; No. 23 of 1996 s. 22; No. 54 of 2003 s. 23; No. 40 of 2010 s. 6.]

101. Minister's powers on appeals under s. 100

- ⁵ When an appeal is lodged under section 100(1) or (4), the Minister may —


- (a) in the case of any appeal so lodged but subject to section 109(3)(a), dismiss the appeal; or
(b) in the case of an appeal referred to in section 100(1)(a), remit the proposal to the Authority for the making of a fresh decision as to whether or not the proposal is to be assessed; or

- (c) in the case of an appeal referred to in section 100(1)(a), remit the proposal to the Authority for assessment and for that purpose make a direction under section 43; or


- ~~(b) in the case of an appeal referred to in section 100(1)(a), remit the proposal to the Authority for the making of a decision, or fresh decision, as to whether or not the proposal is to be assessed, or as to the level of assessment, or both; or~~

- ~~(c) in the case of an appeal referred to in section 100(1)(a), remit the proposal to the Authority for assessment, further assessment or reassessment, as the case requires,~~


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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020 1:59:00 PM


Recommend move section 100(3a)(e) under section 100(3) for concision.

 Number: 2 Author: CME WA Subject: Highlight Date: 16/01/2020 6:57:14 PM


Recommend change '14 days' to '21 days' for consistency and simplicity with amendments to sections 100(3a)(a), 100(3a)(b) and 100(3a)(c).

 Number: 3 Author: CME WA Subject: Highlight Date: 17/01/2020 9:36:50 AM

Change 'him' to 'him / her' or 'them'

 Number: 4 Author: CME WA Subject: Highlight Date: 16/01/2020 6:57:24 PM

Recommend change '14 days' to '21 days' for consistency and simplicity with amendments to sections 100(3a)(a), 100(3a)(b) and 100(3a)(c).

 Number: 5 Author: CME WA Subject: Highlight Date: 17/01/2020 10:03:19 AM

Recommend provide Minister express power to uphold an appeal.

~~and for that purpose make a direction under section 43;~~
~~or~~

- (d) in the case of an appeal referred to in section 100(1)(d) —
 - (i) remit the proposal to the Authority for assessment, further assessment or reassessment, as the case requires, and for that purpose make a direction under section 43; or
 - (ii) vary the Authority's recommendations by changing the implementation conditions;

or

[(da) deleted]

- (db) in the case of an appeal referred to in section 100(1)(e), deal with that appeal under subsections (2d) and (2e); or
- (e) in the case of an appeal against an order served under section 48(4)(b), set aside or alter that order; or
- (f) in the case of an appeal against the taking of any steps under section 48(4)(c) or (d), prohibit the taking of any one or more of those steps, alter any of those steps or substitute a different step for any of those steps,

and the decision of the Minister under this subsection is final and without appeal.

- (1a) When an appeal is lodged under section 100(3), sections 106, 109 and 110 apply to and in relation to the appeal as if the appeal were an appeal from a decision of the Minister.

- (2) When the Minister remits under subsection (1)(b), (c) or (d) a proposal to the Authority for —

- (a) the making of a fresh decision, that decision shall be made; or
- (b) assessment, further assessment or reassessment and makes a direction under section 43, such portions of the procedure laid down by sections 40 to 48 as are

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appropriate shall apply to the proposal and those portions shall be completed,

within such period as the Minister specifies in **1**s remittal.

[(2a)-(2c) deleted]

(2d) When an appeal is lodged under section 100(1)(e), the Minister shall —

- (a) if he considers that the decision of the appeal could affect the content of any condition to which the relevant scheme might be subject, having consulted the responsible Minister under section 48F(1) in respect of that condition and, if possible, agreed with **2**m on that condition, decide the appeal in accordance with that agreement or, in the absence of any such agreement, with the relevant decision under section 48J; or
- (b) if he does not consider that the decision of the appeal could affect the content of any such condition, decide the appeal without consulting the responsible Minister under section 48F(1).

(2e) A decision of the Minister under subsection (2d) is final and without appeal.

3 The lodging of an appeal —

- (a) referred to in section 100(1)(a) does not affect the relevant decision; or
- (b) referred to in section 100(1)(d) or (e) has the effect described in section 45(6) or 48F(3), as the case requires; or
- (c) referred to in section 100(3) as to conditions or procedures agreed under section 45(1C) or (1D) otherwise than as applied by section 46(8) prevents the implementation of the proposal concerned; or
- (d) referred to in section 100(3) as to conditions or procedures agreed under section 45(1C) or (1D) as applied by section 46(8) does not prevent the

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 Number: 1 Author: CME WA Subject: Highlight Date: 13/01/2020
1:59:56 PM

Change 'his' to 'their' or 'his / her'

 Number: 2 Author: CME WA Subject: Highlight Date: 17/01/2020
9:37:03 AM

Change 'him' to 'him / her' or 'them'

 Number: 3 Author: CME WA Subject: Highlight Date: 13/01/2020
2:00:05 PM

Support.

implementation, or continued implementation, of the proposal concerned subject to the implementation conditions; or

~~(e) referred to in section 100(3) prevents the implementation, or continued implementation, of the proposal concerned; or~~

~~[(d) deleted]~~

(e) against an order served under section 48(4)(b) suspends the operation of that order; or

(f) against the taking of any steps under section 48(4)(c) or (d) does not prevent the taking of those steps,

during the period commencing with that lodging and ending with the decision of the Minister under subsection (1) or (2A).~~or (2d).~~

(4) In giving a decision under subsection (1)(f), the Minister may order that section 48(5) does not apply to any steps to which the decision relates and that order has effect according to its tenor.

[Section 101 amended: No. 23 of 1996 s. 23; No. 57 of 1997 s. 54(7) and (8); No. 54 of 2003 s. 24; No. 40 of 2010 s. 7.]

101A. Appeals against decisions as to clearing permits

(1) Subject to section 105, an applicant for —

(a) a clearing permit who is aggrieved by the refusal of the CEO —

(i) to grant the permit under section 51E(5); or

(ii) to grant the permit under section 51E(5) for all of the clearing applied for;

or

(b) a clearing permit who is aggrieved by the specification by the CEO of any condition in the permit under section 51E(5) or 51N(2),

may within 21 days of being notified of that refusal or specification, as the case requires, lodge with the Minister an appeal in writing setting out the grounds of that appeal.

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- (2) Subject to section 105, the holder of a clearing permit who is aggrieved by the amendment of the permit under section 51K(1), or the revocation or suspension of the permit under section 51L(1), may within 21 days of being notified of that amendment, revocation or suspension lodge with the Minister an appeal in writing setting out the grounds of that appeal.
- (3) A person who —
- (a) not being an applicant referred to in subsection (1), disagrees with a specification referred to in that subsection; or
 - (b) not being a holder referred to in subsection (2), disagrees with an amendment referred to in that subsection,
- may within the period within which the applicant or holder can lodge an appeal about that specification or amendment lodge with the Minister an appeal in writing setting out the grounds of that appeal.
- (4) A person who disagrees with a decision of the CEO to grant a clearing permit under section 51E(5) may within 21 days of that grant lodge with the Minister an appeal in writing setting out the grounds of that appeal.
- (5) Subsections (1)(a)(ii) and (b), (3)(a) and (4) do not apply in relation to the grant of a permit pursuant to an undertaking mentioned in section 51E(9).
- (6) Pending the determination of the relevant appeal lodged under subsection (1), (2) or (3) in respect of a refusal, specification, revocation or suspension, the decision against which that appeal is lodged continues to have effect.
- (7) Pending the determination of the relevant appeal lodged under subsection (2) in respect of an amendment, the amendment shall be deemed not to have been made unless it reduces or restricts the extent or method of clearing that may be done, in which case it continues to have effect.

- (8) Pending the determination of the relevant appeal lodged under subsection (3) in respect of an amendment, the amendment continues to have effect.
- (9) Pending the determination of the relevant appeal lodged under subsection (4), the clearing permit shall be deemed not to have been granted.

[Section 101A inserted: No. 54 of 2003 s. 112; amended: No. 40 of 2010 s. 10.]

101B. Appeals against decisions as to environmental protection covenants

(1) Subject to section 105, an applicant —

- (a) under section 86M(1) for the amendment of an environmental protection covenant; or
- (b) under section 86Q(2) for the discharge of an environmental protection covenant.

who is aggrieved by the refusal of the CEO under section 86N(1) or 86Q(3) to amend or discharge the covenant, may, within 21 days of being notified of the refusal, lodge with the Minister an appeal in writing setting out the grounds of the appeal.

(2) Pending the determination of the relevant appeal lodged under subsection (1), the decision against which the appeal is lodged continues to have effect.

(3) Without limiting subsection (1), if an appeal under that subsection is lodged with the Appeals Convenor it is taken to have been lodged with the Minister.

102. Appeals against decisions as to licences~~Appeals against decisions as to works approvals and licences~~

(1) Subject to section 105, an applicant for —

- (a) a licence who is aggrieved by the refusal of the CEO to grant the licence under section 54(1); or

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- (b) the amendment of a licence who is aggrieved by the refusal of the CEO to amend the licence under section 55(1); or
- (c) the transfer of a licence who is aggrieved by the refusal of the CEO to transfer the licence under section 59(1); or
- (d) a licence or transfer of a licence who is aggrieved by the specification by the CEO of any condition in the licence under section 61(1).
- ~~(a) a works approval or licence who is aggrieved by the refusal of the CEO to grant the works approval or licence under section 54(3) or 57(3), as the case requires; or~~
- ~~(b) the transfer of a works approval or licence who is aggrieved by the refusal of the CEO to transfer the works approval or licence under section 64(2); or~~
- ~~(c) a works approval or licence or transfer of a works approval or licence who is aggrieved by the specification by the CEO of any condition in the works approval or licence under section 54(3), 57(3) or 64(2);~~

may within 21 days of being notified of that refusal or specification, as the case requires, lodge with the Minister an appeal in writing setting out the grounds of that appeal.

- (2) Subject to section 105, the holder of a licence who is aggrieved by —
 - (a) the amendment of the licence under section 55(2); or
 - (b) the suspension of the licence under section 56(1); or
 - (c) the refusal to accept the surrender of the licence under section 60(1).

may within 21 days of being notified of that amendment, suspension or refusal lodge with the Minister an appeal in writing setting out the grounds of that appeal.

- (2A) Subject to section 105, the former holder of a licence who is aggrieved by the revocation of the licence under section 56(1)

may within 21 days of being notified of that revocation lodge with the Minister an appeal in writing setting out the grounds of that appeal.

~~—(2) Subject to section 105, the holder of a works approval or licence who is aggrieved by the amendment of the works approval or licence under section 59(1), or the revocation or suspension of the works approval or licence under section 59A(1), may within 21 days of being notified of that amendment, revocation or suspension lodge with the Minister an appeal in writing setting out the grounds of that appeal.~~

(3) A person who —

- (a) not being an applicant referred to in subsection (1), disagrees with a specification referred to in that subsection; or
- (b) not being a holder referred to in subsection (2), disagrees with an amendment referred to in that subsection,

may within the period within which the applicant or holder can lodge an appeal about that specification or amendment lodge with the Minister an appeal in writing setting out the grounds of that appeal.

(4) Pending the determination of the relevant appeal lodged under subsection (1), (2), (2A) or (3) ~~subsection (1), (2) or (3)~~ in respect of a refusal, specification, revocation or suspension, the decision against which that appeal is lodged continues to have effect.

(5) Pending the determination of the relevant appeal lodged under subsection (2) in respect of an amendment, the amendment shall be deemed not to have been made.

(6) Pending the determination of the relevant appeal lodged under subsection (3) in respect of an amendment, the amendment continues to have effect.

*[Section 102 amended: No. 54 of 2003 s. 82, 99 and 140(2);
No. 40 of 2010 s. 11.]*

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103. Appeals against decisions as to notices issued under s. 65, 68A, 70 or 73A

- (1) Subject to section 105, a person who is aggrieved by —
- (a) a requirement contained in a closure notice, environmental protection notice, vegetation conservation notice or prevention notice given to that person; or
 - (b) an amendment contained in a notice given to that person under section 65(4) or under section 65(4) as applied by section 68A(10) or 70(8),

may within 21 days of being given that notice lodge with the Minister an appeal in writing setting out the grounds of that appeal.


- (2) A person (other than a person referred to in subsection (1)) who disagrees with a requirement or amendment referred to in that subsection may within 21 days of the making of that requirement or amendment lodge with the Minister an appeal in writing setting out the grounds of that appeal.
- (3) Pending the determination of an appeal lodged under subsection (1) or (2), the relevant requirement or amendment shall continue to have effect.

[Section 103 amended: No. 54 of 2003 s. 63.]

104. Appeals against CEO's requirements under s. 96 or 97

- (1) A person who is aggrieved by a requirement contained in a notice served on ¹ under section 96(1) or 97(1) may within 21 days of that service lodge with the Minister an appeal in writing setting out the grounds of that appeal.
- (2) Pending the determination of an appeal lodged under subsection (1), a requirement referred to in that subsection shall be deemed not to have been made.

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9:37:09 AM

Change 'him' to 'him / her' or 'them'

105. Matters that cannot be appealed

An appeal shall not be lodged —

- (a) under section 101A, 102 or 103 in respect of anything done by the CEO under section 110 to give effect to a decision of the Minister under section 107(2) or 109(3) on an appeal; or
- ~~(a) under section 101A, 102 or 103 in respect of anything done by the CEO under section 110 to give effect to recommendations referred to in section 109; or~~
- (aa) under section 101A(2) in respect of the amendment of a clearing permit by ~~correcting~~ amending it under section 51K(1)(e), (f), (g) or (h); or
- (b) under section 102(2) in respect of the amendment of a licence by ~~correcting~~ amending it under section 55(3)(e), (f), (h), (i) or (j) ~~under section 59(1)(e), (f), (h), (i) or (j).~~

[Section 105 amended: No. 54 of 2003 s. 83, 113 and 140(2).]

106. Preliminary procedure on appeals

- (1) When an appeal is lodged under this Part, the Appeals Convenor —
 - (a) if the appeal is lodged under section 100, shall request the Authority to report to the Minister on the appeal; and
 - (b) if the appeal is lodged under section 101A, 101B, 102, ~~section 101A, 102,~~ 103 or 104, shall request the CEO to report to the Minister on the appeal; and
 - (c) may consult the appellant and any other appropriate person to determine whether or not the point at issue in the appeal can be resolved; and
 - (d) if the decision appealed against is not a decision of the Minister, shall consider and report to the Minister on the appeal.
- (2) When an appeal is lodged under this Part, the Minister —
 - (a) may, in any case; or

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- (b) shall, if the decision appealed against is a decision of the Minister,

appoint an appeals committee to consider and report to the Minister on the appeal.

- (3) Subsection (2) does not apply to an appeal referred to in section 101(2d).

(3A) Subsection (1) does not apply if an appeals committee has been appointed.

~~(4) If —~~

~~(a) an appeal is lodged under section 100 by a person other than a decision-making authority; and~~

~~(b) the decision-making authority has made submissions to the Minister in respect of the proposal to which the appeal relates;~~

~~the Appeals Convenor shall have regard to those submissions when reporting on, and otherwise dealing with, the appeal.~~

(4) If an appeal is lodged under section 100 by a person other than a decision-making authority and the decision-making authority has made submissions to the Minister in respect of the proposal to which the appeal relates —

(a) the Appeals Convenor must have regard to those submissions when reporting on, and otherwise dealing with, the appeal; and

(b) if an appeals committee has been appointed, it must have regard to those submissions when considering and reporting to the Minister on the appeal.

[Section 106 inserted: No. 54 of 2003 s. 100; amended: No. 40 of 2010 s. 8.]

**107. CEO or Authority to report on appeal if requested;
Minister's powers on appeal**

~~(1) On receiving a request under section 106(1), the Authority or CEO, as the case requires, shall report on the relevant appeal to the Minister.~~

(2) On receiving a report or reports ~~made under~~ mentioned in subsection 106(1)(a), (b) or (d), the Minister may allow or dismiss the appeal to which that report relates and the decision of the Minister under this subsection shall be final and without appeal.

(3) Subsection (2) does not apply to an appeal referred to in section 101(2d).

[Section 107 amended: No. 23 of 1996 s. 25; No. 14 of 1998 s. 24; No. 54 of 2003 s. 101; No. 40 of 2010 s. 9.]

107A. Appeals Convenor, appointment of

(1) The Governor may appoint a person as Appeals Convenor.

(2) The office of Appeals Convenor is not an office in the Public Service and is not to be included in the Senior Executive Service provided for by the *Public Sector Management Act 1994*.

(3) Schedule 7 has effect with respect to the tenure, salary and conditions of service of the Appeals Convenor.

(4) If —

(a) the Appeals Convenor is unable to act by reason of illness, absence or other cause; or

(b) there is a vacancy in the office of Appeals Convenor,

the Minister may appoint a person to act temporarily in the place of the Appeals Convenor, and while so acting according to the tenor of the appointment that person has all of the functions, powers and immunities of the Appeals Convenor.

s. 107B

- (5) No act or omission of a person acting in place of the Appeals Convenor under subsection (4) is to be questioned on the ground that the occasion for the appointment or acting had not arisen or had ceased.

[Section 107A inserted: No. 54 of 2003 s. 102.]

107B. Functions of Appeals Convenor

- (1) Section 109 applies to and in relation to the Appeals Convenor as if the Appeals Convenor were an appeals committee and a report of the Appeals Convenor made under section 106 has effect as if it were a report of an appeals committee.
- (2) In addition to any other function conferred on the Appeals Convenor by this Act, the Appeals Convenor may —
- (a) advise the Minister generally on matters concerning appeals under this Act; and
 - (b) perform such other functions as are conferred on the Appeals Convenor by any other written law.
- (3) There are to be appointed under Part 3 of the *Public Sector Management Act 1994* such officers as are necessary to assist the Appeals Convenor to perform his or her functions.

(4) If an appeal under section 100, 101A, 101B, 102, 103 or 104, as enacted at any time, is lodged with the Appeals Convenor, it is taken to have been lodged with the Minister.

(5) Subsection (4) extends, and is taken to have always extended, to appeals lodged before the coming into operation of the


1 Environmental Protection Amendment Act 2019 **section 2**.

[Section 107B inserted: No. 54 of 2003 s. 102.]


107C. Appeals panel, appointment of

- (1) The Appeals Convenor may convene an appeals panel whenever the Appeals Convenor considers it is necessary or desirable to do so for the purpose of advising the Appeals Convenor on matters arising in an appeal.

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 Number: 1 Author: CME WA Subject: Highlight Date: 24/01/2020
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Update - this does not exist - assume this means to say 2020.

 Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020
2:00:14 PM

Update

- (2) An appeals panel shall consist of one or more persons who, because of professional or other qualifications or experience, is or are in the opinion of the Appeals Convenor qualified to give advice on matters arising in an appeal.
- (3) A member of an appeals panel shall be paid remuneration and allowances as if the member were a member of an appeals committee.

[Section 107C inserted: No. 54 of 2003 s. 102.]

107D. Administrative procedures for appeals

- (1) The Appeals Convenor may, with the approval of the Minister —
 - (a) draw up administrative procedures as to —
 - (i) the conduct of appeals; and
 - (ii) the appointment, composition and duties of an appeals panel;
 - and
 - (b) amend or revoke administrative procedures drawn up under this section; and
 - (c) publish in the *Gazette* administrative procedures drawn up under this section and any amendment or revocation of those administrative procedures.
- (2) If there is an inconsistency between administrative procedures drawn up under this section and this Act or regulations made under Schedule 2 item 35, this Act or those regulations prevail to the extent of that inconsistency.

[Section 107D inserted: No. 54 of 2003 s. 102.]

108. Appeals committees, composition and remuneration of

- (1) An appeals committee shall consist of one person who has, or 2 or more persons at least one of whom has, expertise in environmental matters.

s. 109


- (2) A member of an appeals committee shall be paid such remuneration and travelling and other allowances as the Minister on the recommendation of the Public Sector Commissioner from time to time determines in respect of ^{1m}, but the Minister shall not make such a determination in respect of a person to whom Part 3 of the *Public Sector Management Act 1994* applies except with the prior approval in writing of the Public Sector Commissioner.

[Section 108 amended: No. 32 of 1994 s. 19; No. 57 of 1997 s. 54(9); No. 14 of 1998 s. 37; No. 39 of 2010 s. 89.]

109. Procedure of appeals committees

- (1) In considering an appeal, an appeals committee —
- (a) shall consult —
 - (i) the CEO in the case of an appeal against a decision of the CEO; and
 - (ii) the Authority in the case of an appeal against a decision of the Minister or the Authority; and
 - (iii) the appellant;
 - and
 - (aa) may consult such other persons as it considers necessary; and
 - (b) shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities or legal forms, shall not be bound by any rules of evidence and may conduct its inquiries in whatever manner it considers appropriate.
- (1a) In relation to an appeal lodged under section 101A(2) in respect of the amendment of a clearing permit under section 51K(1)(a) or (b), an appeals committee shall not consider, or make recommendations in respect of, a matter which is not directly related to or consequential to that amendment.

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9:37:14 AM

Change 'him' to 'him / her' or 'them'

- (2) In relation to an appeal lodged under section 102(2) in respect of the amendment of a licence under [section 55\(3\)\(a\)](#) or [\(b\)](#)~~section 59(1)(a) or (b)~~, an appeals committee shall not consider, or make recommendations in respect of, a matter which is not directly related to or consequential to that amendment.
- (3) On completing its consideration of an appeal, an appeals committee shall, subject to subsection (4), report to the Minister on its findings and recommendations in respect of the appeal, and the Minister shall allow or dismiss the appeal —
- (a) if the appeal is from a decision of the Minister, in accordance with; or
 - (b) if the appeal is from a decision other than a decision of the Minister, having regard to,
- those recommendations and the decision of the Minister under this subsection shall be final and without appeal.
- (4) An appeals committee shall not in reporting to the Minister under subsection (3) make any recommendation that conflicts with any approved policy or with any standard prescribed by or under this Act.

[Section 109 amended: No. 54 of 2003 s. 84, 103 and 114.]

110. Minister's decisions on appeals, implementation and publication of

- (1) The CEO shall, as soon as is practicable, give effect to each decision of the Minister under section 101, 107(2) or 109(3) on an appeal.
- (2) The Minister shall cause such details of decisions under this Part in respect of appeals to be published in such manner as is prescribed.

[Section 110 amended: No. 23 of 1996 s. 26; No. 54 of 2003 s. 140(2).]

Environmental Protection Amendment Bill 2019

Part VIIA Landfill levy

Division 1 Collection of levy imposed under Environmental Protection
(Landfill) Levy Act 1998

s. 110A

Part VIIA — Landfill levy

[Heading inserted: No. 14 of 1998 s. 20.]

Division 1 — Collection of levy imposed under *Environmental Protection (Landfill) Levy Act 1998*

[Heading inserted: No. 14 of 1998 s. 20.]

110A. Terms used

In this Part —

Account means the Waste Management and Recycling Account established under section 110H;

levy means a levy imposed under the *Environmental Protection (Landfill) Levy Act 1998*.

[Section 110A inserted: No. 14 of 1998 s. 20; amended: No. 77 of 2006 Sch. 1 cl. 59(2).]

110B. Payment of levy

- (1) A levy is due and payable at such time or times, and in such manner, as is prescribed.
- (2) A levy is payable to the Minister.
- (3) The regulations may provide for the refund or deduction of amounts overpaid by way of levy and the payment of rebates.


[Section 110B inserted: No. 14 of 1998 s. 20.]

110C. Financial assurance

The regulations may make provision —

- (a) empowering the CEO to require ~~a~~ [the holder of a licence licensee](#) to provide a financial assurance for the purpose of securing or guaranteeing payment of a levy; and
- (b) with respect to the form, amount, maintenance and termination of the financial assurance; and

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Can you please confirm when this Part of the Act will be cleaned up?

- (c) with respect to the conditions and procedures under which the financial assurance may be called on or used; and
- (d) with respect to matters necessary for, or incidental to, the effective operation of a financial assurance.

[Section 110C inserted: No. 14 of 1998 s. 20; amended: No. 54 of 2003 s. 140(2).]

110D. Payment by instalments

- (1) The regulations may provide for the payment of an amount of a levy to be made by instalments, and, subject to subsection (2), each instalment is due and payable at a time ascertained in accordance with the regulations.
- (2) If —
 - (a) the regulations provide for the payment of an amount of a levy to be made by instalments; and
 - (b) an instalment is not paid at or before the time due for the payments of the instalment,

the whole of the amount of the levy unpaid becomes due and payable at that time.

[Section 110D inserted: No. 14 of 1998 s. 20.]

110E. Penalty for non-payment

- (1) If an amount of a levy remains unpaid after the day on which it becomes due for payment, there is payable to the Minister by way of penalty, in addition to the amount of the levy, an amount calculated at the rate of 20% per annum upon the amount of the levy from time to time remaining unpaid.
- (2) The amount by way of penalty referred to in subsection (1) is to be calculated from the time when the amount of the levy becomes payable.

[Section 110E inserted: No. 14 of 1998 s. 20.]

Environmental Protection Amendment Bill 2019

Part VIIA Landfill levy

Division 2 Waste Management and Recycling Account

s. 110F

110F. Recovery of levy

The following amounts may be recovered by the Minister in a court of competent jurisdiction as debts due to the Minister —

- (a) a levy that is due and payable; and
- (b) an amount payable under section 110E.

[Section 110F inserted: No. 14 of 1998 s. 20.]

110G. Evading levy

- (1) A person who, by any wilful act, default or neglect, or by any fraud, art or contrivance whatever, evades or attempts to evade payment of all or any amount of a levy commits an offence.

Penalty: \$5 000 and treble the amount evaded or attempted to be evaded.

- (2) The imposition on a person of a fine under subsection (1) does not affect the liability of the person to pay the levy and penalty under section 110E.

[Section 110G inserted: No. 14 of 1998 s. 20.]

Division 2 — Waste Management and Recycling Account

[Heading inserted: No. 14 of 1998 s. 20; amended: No. 77 of 2006 Sch. 1 cl. 59(3).]

110H. Waste Management and Recycling Account

- (1) An account called the Waste Management and Recycling Account is to be established —
 - (a) as an agency special purpose account under section 16 of the *Financial Management Act 2006*; or
 - (b) with the approval of the Treasurer, at a bank as defined in section 3 of that Act.
- (2) The Account is to be administered by the Minister.

- (3) The Account is to be credited with —
- (a) any levy paid; and
 - (b) any amount paid by way of penalty under section 110E; and
 - (c) income derived from the investment of moneys forming part of the Account; and
 - (d) any other moneys lawfully payable to the credit of the Account.
- (4) Moneys held in the Account may be applied by the Minister —
- (a) to fund programmes relating to the management, reduction, reuse, recycling, monitoring or measurement of waste that are approved by the Minister; and
 - (b) in payment of the costs of administering the Account (including the costs of collecting levies and penalties and support and evaluation services).
- (5) Moneys held in the Account may be paid by the Minister to a person or body to conduct a programme relating to the management, reduction, reuse, recycling, monitoring or measurement of waste promoted by that person or body.
- (6) A person or body to whom moneys are paid under subsection (5) who fails to ensure that —
- (a) the moneys are only expended for the purposes of the programme and in accordance with any terms or conditions imposed by the Minister; or
 - (b) a performance evaluation in respect of the programme for which the moneys are paid is carried out in accordance with any written direction of the Minister; or
 - (c) at such time or times as are prescribed, a special purpose audit is carried out by a registered company auditor of the allocation and expenditure of the moneys; or

Environmental Protection Amendment Bill 2019

Part VIIA Landfill levy

Division 2 Waste Management and Recycling Account

s. 110I

- (d) a report on the audit is prepared by the auditor and a copy of the report is provided to the Minister as soon as is practicable after it is prepared,

commits an offence.

- (7) The Minister is to —

- (a) seek the advice of such persons and bodies as the Minister thinks fit as to the setting and variation of a levy and the development of policy for the application of money from the Account; and
- (b) from time to time develop and publish a statement of the objectives to be achieved by programmes funded under this section.

- (8) The annual report of the Department prepared for the purposes of Part 5 of the *Financial Management Act 2006* is to include a summary of any written performance evaluation carried out pursuant to a direction of the Minister by a person or body to whom moneys are paid under subsection (5).

[Section 110H inserted: No. 14 of 1998 s. 20; amended: No. 28 of 2006 s. 211; No. 77 of 2006 Sch. 1 cl. 59(4)-(6).]

110I. Application of *Financial Management Act 2006* and *Auditor General Act 2006*

- (1) The provisions of the *Financial Management Act 2006* and the *Auditor General Act 2006* regulating the financial administration, audit and reporting of departments apply to and in relation to the Account.
- (2) The administration of the Account is for the purposes of section 52 of the *Financial Management Act 2006* to be regarded as a service of the Department.

[Section 110I inserted: No. 14 of 1998 s. 20; amended: No. 77 of 2006 Sch. 1 cl. 59(7)-(9).]

110J. Review of Part VIIA

The Minister shall carry out a review of the operation and effectiveness of this Part as soon as practicable after the expiry of 3 years from the coming into operation of section 20 of the *Environmental Protection Amendment Act 1998*¹ and cause a report based on the review to be prepared and laid before each House of Parliament as soon as practicable after the review is completed.

[Section 110J inserted: No. 14 of 1998 s. 20.]

[Part VIIB (s. 110K-110T) deleted: No. 36 of 2007 s. 100.]

1 **Part VIIB — Environmental monitoring programmes**

Division 1 — Preliminary

110K. Terms used

In this Part —

environmental monitoring programme means a monitoring programme established to monitor the impact on the environment of one or more prescribed activities, including pollution or environmental harm resulting from the activity or activities;

levy means a levy imposed under Division 5;

monitoring station means equipment or a facility for collecting and obtaining data, and taking measurements, for the purposes of an environmental monitoring programme.

Division 2 — Establishment of environmental monitoring programmes

2 **10L. Regulations as to environmental monitoring programmes**

Regulations may —

(a) provide for the investigations, consultation or other processes to be carried out or undertaken to determine if an environmental monitoring programme is needed; and

(b) provide for the development, establishment, implementation and operation of an environmental monitoring programme; and

(c) provide for the powers that may be exercised for the purposes of —

(i) determining whether an environmental monitoring programme is needed; and

(ii) developing, establishing, implementing or operating an environmental monitoring programme;

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Although CME understands the intent of this new Part, there is limited detail as to how this will function in practice and how the environmental monitoring programs will practically be bounded etc to prevent exploitation and overuse and to ensure transparency / accountability. Further detail is required.

Number: 2 Author: CME WA Subject: Highlight Date: 25/01/2020 2:28:40 PM

CEO reports on environmental monitoring programs should be made publicly available. The frequency of these reports should be outlined in the EP Act or EP Regulations. What will the reports include?

_____ and

_____ (d) without limiting paragraph (c)(ii) —

_____ (i) provide for the installation, maintenance and operation of monitoring stations and for agreements to be entered for those purposes; and

_____ (ii) require persons who own or occupy land to provide assistance relating to the installation, maintenance and operation of monitoring stations on the land;

_____ and

_____ (e) provide for and regulate the ownership, use and dissemination of data collected and obtained in the implementation and operation of an environmental monitoring programme; and

_____ (f) require the CEO to review and report on an environmental monitoring programme.

Division 3 — Collection of levy

110M. Payment of levy

_____ (1) A levy is due and payable at the time or times, and in the manner, prescribed by the regulations.

_____ (2) A levy is payable to the Minister.

_____ (3) The regulations may provide for the refund or deduction of amounts overpaid by way of levy and the payment of rebates.

_____ (4) Any levy paid is to be credited to an operating account of the Department established under the *Financial Management Act 2006* section 16(1)(a).

110N. Financial assurance

_____ The regulations may make provision —

_____ (a) empowering the CEO to require a licensee, or a person required under the EP Act to hold a licence, to provide a

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Part VII B Environmental monitoring programmes

Division 3 Collection of levy

s. 110O

financial assurance for the purpose of securing or guaranteeing payment of a levy; and

(b) with respect to the form, amount, maintenance and termination of the financial assurance; and

(c) with respect to the conditions and procedures under which the financial assurance may be called on or used; and

(d) with respect to matters necessary for, or incidental to, the effective operation of a financial assurance.

110O. Payment by instalments

(1) The regulations may provide for the payment of an amount of a levy to be made by instalments, and, subject to subsection (2), each instalment is due and payable at a time ascertained in accordance with the regulations.

(2) If —

(a) the regulations provide for the payment of an amount of a levy to be made by instalments; and

(b) an instalment is not paid at or before the time due for the payment of the instalment,

the whole of the amount of the levy unpaid becomes due and payable at that time.

110P. Penalty for non-payment

(1) If an amount of a levy remains unpaid after the day on which it becomes due for payment, there is payable to the Minister by way of penalty, in addition to the amount of the levy, an amount calculated at the rate of 1% per annum upon the amount of the levy from time to time remaining unpaid.

(2) The amount by way of penalty referred to in subsection (1) is to be calculated from the time when the amount of the levy becomes payable.

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Can you please confirm from where the 20% rate is derived?

110Q. Recovery of levy

The following amounts may be recovered by the Minister in a court of competent jurisdiction as debts due to the Minister —

- (a) an amount of a levy that is due and payable;
- (b) an amount payable under section 110P.

110R. Evading levy

- (1) A person who evades or attempts to evade payment of all or any amount of a levy commits an offence.

1 penalty: a fine of \$10 000 and treble the amount evaded or attempted to be evaded.

- (2) The imposition on a person of a fine under subsection (1) does not affect the liability of the person to pay any amount of the levy and any penalty under section 110P.

Division 4 — Establishment and application of Environmental Monitoring Account

110S. Environmental Monitoring Account

- (1) There is to be established and kept as an agency special purpose account established under the *Financial Management Act 2006* section 16 an account to be called the “Environmental Monitoring Account” (the **2** EM Account).

- (2) The EM Account is to be administered by the CEO.

- (3) The EM Account is to be credited with —

- (a) the amount of the levy credited to the Department’s operating account under section 110M(4); and
- (b) any amount paid by way of penalty under section 110P; and
- (c) income derived from the investment of moneys forming part of the EM Account; and

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📄 Number: 1 Author: CME WA Subject: Highlight Date: 24/01/2020
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Please confirm, does this mean if you are one day late paying an installment, you are then automatically due all other remaining installments plus a fine of \$10,000 plus 3x the total amount of all installments? This seems like a disproportionate penalty for being a day late on an installment.

📄 Number: 2 Author: CME WA Subject: Highlight Date: 13/01/2020
2:00:23 PM

Change format - bold, italics

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Part VII B Environmental monitoring programmes

Division 4 Establishment and application of Environmental Monitoring Account

s. 110T

(d) any amount of a prescribed kind; and

(e) any other moneys lawfully payable to the credit of the EM Account.

110T. How moneys in EM Account are to be spent

Moneys held in the EM Account are to be applied for the following purposes —

(a) determining whether an environmental monitoring programme is needed;

(b) developing, establishing, implementing and operating environmental monitoring programmes;

(c) the refund of amounts overpaid by way of levy, and the payment of rebates, under the regulations;

(d) a purpose of a prescribed kind;

(e) any other purpose relating to environmental monitoring programmes that is approved by the Minister.

110U. Application of Financial Management Act 2006 and Auditor General Act 2006

(1) The provisions of the *Financial Management Act 2006* and the *Auditor General Act 2006* regulating the financial administration, audit and reporting of departments apply to and in relation to the EM Account.

(2) The administration of the EM Account is for the purposes of the *Financial Management Act 2006* section 52 to be regarded as a service of the Department.

Division 5 — Imposition of levy

[NOTE: This Division) will need to be inserted by a separate Act to comply with constitutional requirements]

110V. Term used

In this Division —

monitored activity means a prescribed activity, as defined in section 3(1), the impact of which is monitored under an environmental monitoring programme.

110W. Levy may be prescribed

(1) The Governor may make regulations under the EP Act prescribing an amount by way of levy that is to be payable by persons who carry out a monitored activity.

(2) The regulations may —

(a) provide that an amount by way of levy is to be payable in all cases, in all cases subject to specified exceptions or in any specified case or class of case; and

(b) prescribe different amounts by way of levy that are payable in respect of different cases or classes of case; and

(c) provide for the levy to be calculated on a specified basis, and in accordance with specified factors.

(3) Nothing in this section is to be taken as limiting the operation of the Interpretation Act 1984 section 43.

110X. Levy imposed

If an amount by way of levy is prescribed to be payable by persons carrying out a monitored activity, that levy is imposed.

Environmental Protection Amendment Bill 2019

Part VII B Environmental monitoring programmes

Division 5 Imposition of levy

s. 110Y

110Y. Liability to pay levy

If a levy is imposed under section 110X, the following persons are liable to pay the amount of any levy —

- (a) if there is a licence authorising the carrying out of the monitored activity, the holder of the licence;
- (b) if the monitored activity is being carried out without a licence being in force, a person required under the EP Act to hold a licence to carry out the monitored activity.

Part VIII — General

111. Saving of rights at law to prevent etc. pollution etc.

Nothing in this Act in any way affects any right any person has at law to prevent, control or abate pollution or environmental harm or to obtain damages.

[Section 111 amended: No. 54 of 2003 s. 64.]

111A. Victimisation of informants etc.

- (1) A person who for a reason described in subsection (2) —
 - (a) prejudices, or threatens to prejudice, the safety or career of another person; or
 - (b) intimidates or harasses, or threatens to intimidate or harass, another person; or
 - (c) takes, or threatens to take, detrimental action against another person,commits an offence.
- (2) The reasons referred to in subsection (1) are that the other person or a member of the other person's family —
 - (a) has furnished, is furnishing, or will or may in the future furnish, information or assistance —
 - (i) in the course of, or for the purpose of, an inspection or investigation under this Act; or
 - (ii) to the CEO for a purpose relating to the administration of this Act;
 - or
 - (b) has made, or will or may in the future make, an appropriate disclosure of information that tends to show that another person is, has been, or proposes to be involved in an offence under this Act.

s. 112

- (3) In subsection (1) —
detrimental action includes action causing, comprising or involving —
- (a) damage or loss; or
 - (b) adverse discrimination, disadvantage, or adverse treatment in relation to a person's career, profession, employment, trade or business; or
 - (c) a reprisal.
- (4) For the purposes of this section, a reference to an appropriate disclosure of information is a reference to a disclosure of information if, and only if, the disclosure is made in good faith and with an honest and reasonable belief that the information is of sufficient significance to justify its disclosure so that its truth may be investigated.

[Section 111A inserted: No. 54 of 2003 s. 132(1).]

112. False information


A person who, in purporting to comply with a requirement or request made by or under this Act to give information to the Minister, the Authority, the CEO, an authorised person or an inspector or a police officer, gives or causes to be given information that to ¹s knowledge is false or misleading in a material particular commits an offence.

[Section 112 amended: No. 54 of 2003 s. 140(2).]

112A. Self-incrimination

- (1) An individual is not excused from answering a question or producing a document when required to do so under Part VI on the ground that to do so might tend to incriminate the individual or make the individual liable to a penalty.

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Change 'his' to 'their' or 'his / her'

- (2) An answer given, or document produced, by an individual when required to do so under Part VI is not admissible in evidence against the individual in any criminal proceeding (other than proceedings in respect of giving false or misleading information). ~~information) if the individual objected at the time of doing so on the ground that it might incriminate the individual.~~
- (3) Further information obtained as the result of an answer given, or document produced, by an individual when required to do so under Part VI is not inadmissible on the ground that —
- (a) the answer or document was required to be given; or
 - (b) the answer or document might incriminate the individual.

[Section 112A inserted: No. 14 of 1998 s. 15.]

[113. Deleted: No. 14 of 1998 s. 16.]

114. Prosecutions, who may institute

- (1) Proceedings in respect of a Tier 1 offence, whether by way of —
- (a) giving a modified penalty notice under section 99A; or
 - (b) prosecution for the offence,
- as determined by the CEO, are not to be instituted otherwise than by the CEO.

~~—(1) A prosecution for a Tier 1 offence is not to be instituted otherwise than by the CEO.~~

- (1a) Subject to subsections (3) and (4), proceedings in respect of a Tier 2 offence, whether by way of —
- (a) giving a modified penalty notice under section 99A; or
 - (b) prosecution for the offence,
- as determined by the CEO, are not to be instituted otherwise than by the CEO.

s. 114

- (1b) Subject to [section 79\(2\) and \(3\)](#), a prosecution for a Tier 3 offence or an offence under a regulation ~~section 79(2), a prosecution for a Tier 3 offence~~ is not to be instituted otherwise than by —

- (a) the CEO; or
- (b) an authorised person acting under a power which that person is entitled by an authority issued under section 87 to exercise.

- (1c) The Minister is not to give a direction or instruction to the CEO in respect of the giving of a modified penalty notice or an infringement notice or the institution of a prosecution.

[(2) deleted]

- [\(3\) A prosecution for an offence under section 49A\(2\) or \(3\), 81\(2\), 82\(2\), 83 or 93 may be instituted by any of the following —](#)

- [\(a\) the CEO;](#)
- [\(b\) a police officer, acting with the consent of the CEO;](#)
- [\(c\) the chief executive officer of a local government, acting with the consent of the CEO.](#)

~~— (3) A prosecution for an offence under section 49A(2) or (3), 81(2), 82(2), 83 or 93 may be instituted by a police officer, or the chief executive officer of a local government, acting with the consent of the CEO.~~

- (4) If the CEO has delegated a power under section 65(1) to a local government or the chief executive officer or an employee of a local government, a prosecution for an offence under section 65(5) in respect of a failure to comply with a requirement contained in an environmental protection notice caused to be served under section 65(1) by that local government, chief executive officer or employee may be instituted by [the CEO or](#) the chief executive officer of the local government.

[Section 114 amended: No. 50 of 1996 s. 12; No. 14 of 1998 s. 17; No. 54 of 2003 s. 133 and 140(2); No. 48 of 2010 s. 10.]

114A. Prosecutions, limitation periods for

- (1) A prosecution for a Tier 1 offence may be commenced at any time.
- (2) A prosecution for any other offence under this Act may be commenced within 24 months after the date on which the alleged offence was committed.
- (3) Despite subsection (2), if a prosecution notice alleging an offence to which subsection (2) applies specifies the day on which evidence of the alleged offence first came to the attention of a person authorised to institute the prosecution under section 114 —
 - (a) the prosecution may be commenced within 24 months after that day; and
 - (b) the prosecution notice need not contain particulars of the day on which the offence is alleged to have been committed.
- (4) The day on which evidence first came to the attention of a person authorised to institute a prosecution under section 114 is the day specified in the prosecution notice, unless the contrary is shown.

[Section 114A inserted: No. 54 of 2003 s. 134; amended: No. 59 of 2004 s. 141; No. 84 of 2004 s. 80.]

115. Investigation expenses

The court by or before which a person is convicted of an offence under this Act may, whether or not it imposes any other punishment, order that the person convicted pay the reasonable costs of and incidental to any inspection, measurement, test, analysis or other action made or taken by or on behalf of the prosecution towards the investigation of the offence and the giving of evidence relating thereto, and may make such order as that court thinks just as to those costs.

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116. Disputes between Authority and other public authority

Any question, difference or dispute arising or about to arise between the Authority and any public authority with respect to the exercise or performance of any rights or functions by either or both of them may be finally and conclusively determined by the Governor.

116A. Proof not required of certain matters

In proceedings for an offence under this Act, proof is not required of any of the following matters, unless evidence is given to the contrary —

- (a) that the prosecutor is authorised to institute the prosecution;
- (b) that a signature on the prosecution notice alleging the offence is the signature of a person authorised to institute the prosecution;
- (c) that at a specified time a specified person was the CEO, an authorised officer or an inspector or a person assisting an inspector under section 89A;
- (d) that at a specified time a specified authorised person or a specified inspector was authorised to do a specified thing.

117. Proof of documents

- (1) In all proceedings in which any notice, order or other document required or authorised to be given to or served on a party to the proceedings under this Act has to be proved, the party is deemed to have received notice to produce it, and, until the contrary is shown, that document and its due giving or service may be sufficiently proved by the production of what purports to be a copy, bearing what purports to be a certificate under the hand of the person authorised to issue the original that that copy is a true copy of the original and that the original was served on the date specified in the certificate.

- (2) The validity of any notice, order or other document or of its giving or service is not affected by any error, misdescription or irregularity which —
 - (a) is not calculated to mislead; and
 - (b) in fact does not mislead.

[Section 117 amended: No. 84 of 2004 s. 80.]

118. Liability of body corporate and directors etc. of body corporate

- (1) If a body corporate commits an offence under this Act or the regulations, each person who is a director or who is concerned in the management of the body corporate is taken to have also committed the same offence unless the person proves that —
 - (a) the person did not know, and could not reasonably be expected to have known, that the offence was being committed; or
 - (b) the person —
 - (i) was not in a position to influence the conduct of the body corporate in relation to the commission of the offence; or
 - (ii) being in such a position, used all due diligence and reasonable precautions to prevent the commission of the offence;or
 - (c) the body corporate would not have been found guilty of the offence by reason of being able to establish a defence available to it under this Act.
- (2) Under this section a person may be proceeded against and convicted of an offence whether or not the body corporate has been proceeded against or convicted in respect of the commission of the offence.
- (3) Nothing in this section prejudices or affects any liability imposed on a body corporate for an offence committed by the body corporate against this Act or the regulations.

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- (4) Without limiting any other law or practice regarding the admissibility of evidence, evidence that an officer, employee or agent of a body corporate (while acting in his or her capacity as such) had, at any particular time, a particular state of mind, is evidence that the body corporate had that state of mind.

[Section 118 inserted: No. 54 of 2003 s. 135.]

119. Averment of occupation or control

In a prosecution for an offence under this Act, an averment in the prosecution notice to the effect that —

- (a) a person was the occupier of or in control of any premises or of any part of any premises is deemed to be proved in the absence of proof to the contrary; or
- (b) in relation to any matter the subject of the prosecution notice, a ~~works approval or~~ licence was not held or any other form of authorisation had not been given is deemed to be proved in the absence of proof to the contrary.


[Section 119 amended: No. 84 of 2004 s. 80.]

120. Disclosing certain information restricted


A person who discloses any information relating to any manufacturing process or trade secret used in carrying on or operating any particular undertaking or equipment that has been furnished to **1m** or obtained by **2m** under this Act, or in connection with the execution of this Act, unless the disclosure is made —

- (a) with the consent of the person carrying on or operating that undertaking or equipment; or
- (b) under or in connection with the execution of this Act; or
- ~~(ba) under a bilateral agreement; or~~
- (c) with the prior permission in writing of the Minister; or

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Change 'him' to 'him / her' or 'them'

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- (d) for the purposes of any legal proceedings arising out of this Act or of any report of such proceedings,

commits an offence.

[Section 120 amended: No. 54 of 2003 s. 108.]

121A. Authority to perform certain functions in relation to Crown land for purposes of this Act

- (1) If, under a provision of this Act, the owner or occupier of Crown land or freehold land in the name of the State may give, or is required to give, notice or may make an application or representation, give comments or authority, show cause, provide information or do any other thing, that thing may be done by —
 - (a) the Minister as defined in the *Land Administration Act 1997* section 3(1) (the **Minister for Lands**); or
 - (b) a public service officer of the Department, as defined in the *Land Administration Act 1997* section 3(1), who is authorised in writing by the Minister for Lands to do so.
- (2) Nothing in this section limits the ability of the Minister for Lands to otherwise perform a function through an officer or agent.
- (3) Nothing in this section affects —
 - (a) a right or obligation that any other person has under Part V Division 2 in relation to land mentioned in subsection (1) if the person is an **owner** or **occupier** of that land because of the meaning of those terms in that Division; or
 - (b) a right or obligation that any other person has under any other provision of this Act in relation to land mentioned in subsection (1) if the person is an **occupier** of that land because of the meaning of occupier in section 3(1); or
 - (c) how that right may be exercised or that obligation may be satisfied.

[Section 121A inserted: No. 8 of 2010 s. 10.]

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121. Protection from personal liability

- (1) An action in tort does not lie against —
- (a) a person for anything that the person has done, in good faith, in the performance or purported performance of a function under this Act; or
 - (b) a person acting under an authority mentioned in section 121A(1) for anything that the person has done, in good faith, in the performance or purported performance of a function to which the authority applies.
- (2) The protection given by subsection (1) applies even though the thing done as described in that subsection may have been capable of being done whether or not this Act had been enacted.
- (3) This section does not relieve the Crown of any liability that it might have for another person having done anything as described in that subsection.
- (4) In this section, a reference to the doing of anything includes a reference to the omission to do anything.

[Section 121 inserted: No. 54 of 2003 s. 136; amended: No. 8 of 2010 s. 11.]

122. Administrative procedures, Authority may establish

- (1) The Authority may from time to time —
- (a) draw up administrative procedures for the purposes of this Act and in particular for the purpose of establishing the principles and practices of environmental impact assessment; and
 - (b) amend or revoke administrative procedures drawn up under this section; and
 - (c) publish in the *Gazette* any administrative procedures drawn up under this section and any amendment or revocation of those administrative procedures.

- (2) If there is an inconsistency between administrative procedures drawn up under this section and regulations made under item 34 of Schedule 2, those regulations shall prevail to the extent of that inconsistency.

122A. Codes of practice

- (1) The CEO, on the recommendation of the Authority, may issue codes of practice in relation to activities that involve an emission or environmental harm.
- (2) The CEO must not issue a code of practice unless the code of practice was developed by the CEO after consultation with and, by written notice, seeking submissions from —
 - (a) the Authority; and
 - (b) such State authorities as the CEO considers appropriate; and
 - (c) such industry groups as the CEO considers appropriate; and
 - (d) such environmental and other groups as the CEO considers appropriate.
- (3) The CEO may seek submissions from the public on a proposed code of practice.
- (4) A code of practice issued under this section is subsidiary legislation within the meaning of the *Interpretation Act 1984*.

[Section 122A inserted: No. 54 of 2003 s. 65.]

123. Regulations

- (1) The Governor may make regulations —
 - (a) prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed, for giving effect to the purposes of this Act; and
 - (b) if any act, matter or thing required or authorised to be done under or in relation to an NEPM for the purpose of implementing the NEPM cannot conveniently be

s. 124

required or authorised under the provisions of this Act,
requiring or authorising the doing of such act, matter or
thing.

- (2) Without limiting the generality of subsection (1), regulations may be made under that subsection in respect of the matters set out in Schedule 2.
- (3) Regulations made under subsection (1) may —
 - (a) adopt, either wholly or in part or with modifications and either specifically or by reference, any rules, standards, regulations, local laws, by-laws, codes, instructions, specifications or administrative procedures prescribed or published by any person or public authority, including the Authority and the CEO, either as in force at the time of prescription or publication or as amended from time to time thereafter; or
 - (b) without derogating from section 43 of the *Interpretation Act 1984*, be general or be restricted in operation in respect of time, place, persons or circumstances, whether or not any such time, place, persons or circumstances is or are determined or ascertainable before, at or after the making of those regulations.
- (4) Regulations made under subsection (1)(b) are valid and have effect even if they are inconsistent with or repugnant to a provision contained elsewhere in this Act.


[Section 123 amended: No. 14 of 1996 s. 4; No. 14 of 1998 s. 35; No. 54 of 2003 s. 137 and 140(2).]

124. Review of Act


- (1) The Minister shall carry out a review of the operation and effectiveness of this Act as soon as is practicable after the expiry of 5 years from its commencement, and in the course of that review the Minister shall consider and have regard to —

- (a) the effectiveness of the operations of the Authority and any group, committee, council or panel established under section 25(1); and
 - (b) the need for the continuation of the functions of the Authority and any group, committee, council or panel established under section 25(1); and
 - (c) such other matters as appear to ¹m to be relevant to the operation and effectiveness of this Act.
- (2) The Minister shall prepare a report based on ²s review made under subsection (1) and shall, as soon as practicable after the preparation thereof, cause the report to be laid before each House of Parliament.

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Change 'him' to 'him / her' or 'them'

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**Part IXA — Bilateral agreements with the
Commonwealth**

124A. Terms used

In this Part, unless the contrary intention appears —

bilateral agreement means an agreement referred to in the
Commonwealth Environment Act section 45(2) to which the
State is a party;

bilateral matter means a matter in respect of which an
application has been made in accordance with regulations
referred to in section 124D;

guidelines includes, policies, plans and information;

State entity means the Minister, the CEO or the Authority.

124B. Effect of Part

This Part has effect despite any other provision of this Act.

124C. Additional function of Authority

(1) It is a function of the Authority to facilitate the implementation
of bilateral agreements.

(2) A reference in any enactment to the Authority's functions
includes a reference to its function under subsection (1).

**124D. Application for a matter to be dealt with as a bilateral
matter**

Regulations may provide for procedures under which a person
may apply for a matter to be dealt with under this Act as a
bilateral matter where, under a bilateral agreement, the
performance of functions in respect of the matter by a State
entity will or may have effect for the purposes of the
Commonwealth Environment Act.

124E. Performance of functions in respect of bilateral matters

- (1) A State entity may perform functions under this Act in respect of a bilateral matter in a manner that is consistent with, and enables the implementation of, a bilateral agreement.
- (2) When performing functions under this Act in respect of a bilateral matter a State entity may have regard to guidelines in accordance with a bilateral agreement.
- (3) Without limiting subsection (1) or section 17, for the purposes of performing functions under Part IV in respect of a bilateral matter the Authority may, in relation to a proposal —
 - (a) have regard to requirements made by a bilateral agreement when deciding the level of assessment to be used; and
 - (b) prepare guidelines and publish material as required under a bilateral agreement; and
 - (c) require the proponent to do anything necessary to give effect to a bilateral agreement; and
 - (d) make its assessment and report in a manner that satisfies the requirements of a bilateral agreement.
- (4) Without limiting subsection (1), when consulting with other Ministers and decision-making authorities or making decisions for the purposes of Part IV in respect of a bilateral matter, the Minister may —
 - (a) rely on a report of the Authority, including any part of the report relating to matters of national environmental significance under the Commonwealth Environment Act; and
 - (b) impose implementation conditions for the purpose of the implementation of a bilateral agreement.

s. 124F

(5) Without limiting subsection (1), when performing functions under Part V Division 2 in respect of a bilateral matter the CEO may —

- (a) have regard to requirements made by a bilateral agreement; and
- (b) prepare guidelines and publish material as required under a bilateral agreement; and
- (c) require a person to do anything necessary to give effect to a bilateral agreement; and
- (d) make any assessment and report required by a bilateral agreement in a manner that satisfies the requirements of a bilateral agreement; and
- (e) attach conditions to a clearing permit for the purpose of the implementation of a bilateral agreement.

(6) When performing functions under Part VII in relation to an appeal in respect of a bilateral matter the following are to have regard to the effect of subsections (1) to (5) on the performance of functions —

- (a) the Minister;
- (b) the Authority;
- (c) the CEO;
- (d) the Appeals Convenor;
- (e) an appeals panel;
- (f) an appeals committee.

124F. Fees in relation to bilateral matters

(1) Regulations may prescribe, or provide for the determination of, fees payable to a State entity, or a delegate of a State entity, in respect of things done, or to be done, by the State entity or delegate in respect of a bilateral matter.

- (2) Regulations relating to a fee in respect of a matter may prescribe, or provide for the determination of, a greater or additional fee if the matter is, or is to be, dealt with as a bilateral matter.
- (3) Schedule 2 items 2 and 2A apply in relation to fees mentioned in this section.

124G. Disclosure of information for the purposes of bilateral agreements

- (1) Subject to this section, the provisions of this Act in relation to the confidentiality and disclosure of information apply to information obtained in or for the purposes of the performance of functions in accordance with this Part.
- (2) To facilitate the implementation of a bilateral agreement a State entity may disclose information to a person that performs functions under the Commonwealth Environment Act.
- (3) A person does not commit an offence under section 120 if the disclosure of information referred to in that section is made under a bilateral agreement.

124H. Regulations

Without limiting section 123(1) and (2), regulations may be made under section 123(1) prescribing all matters that are required or permitted by this Part to be prescribed or that are necessary or convenient to be prescribed for —

- (a) giving effect to the purposes of this Part; or
- (b) facilitating the implementation of bilateral agreements.

Part IX — Transitional

Division 1 — Transitional provisions for *Environmental Protection Act 1986*

[Heading inserted: No. 40 of 2010 s. 12.]

125. Interpretation Act 1984 not affected

Nothing in this Part shall be construed so as to limit the operation of the *Interpretation Act 1984*.

126. Transitional provisions for *Environmental Protection Act 1971* ¹

The transitional provisions set out in Schedule 3 shall have effect in relation to the repealed Act.

127. Transitional provisions not related to *Environmental Protection Act 1971* ²

The transitional provisions set out in Schedule 4 shall have effect in relation to the Acts referred to in that Schedule.

128. General saving

Subject to this Act, all acts, matters and things which immediately before the coming into operation of the relevant provision of the *Acts Amendment and Repeal (Environmental Protection) Act 1986* ³ were in existence or in operation under an Act amended by that provision shall, insofar as is consistent with that Act as so amended, subsist and enure as if at the time when they originated or were done that Act as so amended had been in operation and they had originated or been done thereunder.

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Division 2 — Transitional provisions for *Approvals and Related Reforms (No. 1) (Environment) Act 2010* Part 2

[Heading inserted: No. 40 of 2010 s. 13.]

129. Term used: amending Act

In this Division —

amending Act means the *Approvals and Related Reforms (No. 1) (Environment) Act 2010*.

[Section 129 inserted: No. 40 of 2010 s. 13.]

130. Appeals in respect of proposals

(1) In this section —

former EP Act means the *Environmental Protection Act 1986* as in force immediately before the amending Act Part 2 Division 1 comes into operation.

(2) The former EP Act continues to apply in respect of a decision of the Authority made before the day on which the amending Act Part 2 Division 1 comes into operation.

[Section 130 inserted: No. 40 of 2010 s. 13.]

131. Appeals in respect of clearing permits

(1) In this section —

former EP Act means the *Environmental Protection Act 1986* as in force immediately before the amending Act Part 2 Division 2 comes into operation.

(2) The former EP Act continues to apply in respect of a decision of the CEO made before the day on which the amending Act Part 2 Division 2 comes into operation.

[Section 131 inserted: No. 40 of 2010 s. 13.]

Environmental Protection Amendment Bill 2019

Part IX Transitional

Division 3 Transitional provisions for Approvals and Related Reforms
(No. 1) (Environment) Act 2010 Part 3

s. 132

132. Appeals in respect of works approvals and licences

- (1) In this section —

former EP Act means the *Environmental Protection Act 1986* as in force immediately before the amending Act Part 2 Division 3 comes into operation.

- (2) The former EP Act continues to apply in respect of a decision of the CEO made before the day on which the amending Act Part 2 Division 3 comes into operation.

[Section 132 inserted: No. 40 of 2010 s. 13.]

Division 3 — Transitional provisions for Approvals and Related Reforms (No. 1) (Environment) Act 2010 Part 3

[Heading inserted: No. 40 of 2010 s. 18.]

133. Minor or preliminary work that has Authority's consent

- (1) In this section —

amended EP Act means the *Environmental Protection Act 1986* as amended by the *Approvals and Related Reforms (No. 1) (Environment) Act 2010* Part 3.

- (2) The amended EP Act applies —

- (a) in respect of a proposal irrespective of when the proposal was or is referred to the Authority; and
- (b) in respect of an application irrespective of when the application was or is made to the CEO.

[Section 133 inserted: No. 40 of 2010 s. 18.]

Division 4 — Transitional provisions for *Environmental Protection Amendment Act 2019*

Subdivision 1 — General provision

133A. Term used: amending Act

In this Division —

amending Act means the *Environmental Protection Amendment Act 2019*.

Subdivision 2 — Transitional provisions relating to clearing matters

133B. Declaration of environmentally sensitive areas

(1) In this section —

former section means section 51B as in force before the coming into operation of section **1** of the amending Act;

new section means section 51B as in force after the coming into operation of section **2** of the amending Act;

regulations means regulations made under the new section.

(2) Until regulations come into operation the declaration of an environmentally sensitive area by notice made under the former section continues to have effect as if it had been made by regulations.

133C. Clearing permit applications

(1) In this section —

commencement day means the day of the coming into operation of section **3** of the amending Act;

existing application means an application for a clearing permit made under section 51E before the commencement day that has neither been withdrawn nor dealt with under section 51E(3) or (5) before the commencement day.

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Environmental Protection Amendment Bill 2019

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Division 4 Transitional provisions for Environmental Protection
Amendment Act 2019

s. 133C

(2) On and from the commencement day an existing application is to be taken to have been the referral under and in accordance with section 51DA(2) (the *deemed referral*) of a proposal for the clearing specified in the existing application.

(3) If the CEO did not comply with section 51E(4)(c) in relation to an existing application before the commencement day, section 51DA(3) to (6) apply to the deemed referral, and if the person who made the existing application —

(a) receives notice under section 51DA(5) that the CEO has decided that a clearing permit is needed for the proposed clearing; or

(b) does not receive any notice under section 51DA(5) within the period of 21 days beginning on the commencement day,

the person may, in writing, request the CEO to treat the deemed referral as an application for a clearing permit under section 51E(1).

(4) If the CEO complied with section 51E(4)(c) in relation to an existing application before the commencement day, the person who made the existing application is to be taken to have —

(a) received notice under section 51DA(5) that the CEO has decided that a clearing permit is needed for a proposed clearing; and

(b) requested the CEO under section 51DA(7) to treat the deemed referral as an application for a clearing permit under section 51E(1).

(5) If a request is made under subsection (3), or if subsection (4) applies, the deemed referral is to be treated as an application for a clearing permit under section 51E, and section 51DA(8) does not apply.

133D. Clearing injunctions

(1) In this section —

clearing injunction has the meaning given in section 51S(2) of this Act as in force before the commencement day;

commencement day means the day of the coming into operation of sections **1** and **2** of the amending Act;

conduct injunction has the meaning given in section **3**C(2);

existing application means an application for a clearing injunction made under section 51S of this Act as in force before the commencement day that has neither been withdrawn nor finally determined before the commencement day.

(2) A clearing injunction in force immediately before the commencement day has effect on and after the commencement day as if it were a conduct injunction.

(3) An existing application has effect on and after the commencement day as if it were an application for a conduct injunction made under section **4**C(3).

Subdivision 3 — Transitional provisions relating to works approvals and licences

133E. Terms used

In this Subdivision —

commencement day means the day of the coming into operation of section **5** of the amending Act;


existing Act means this Act as in force immediately before the coming into operation of the amending Act;

former provisions means Part V Division 3 as in force before the commencement day;


new licence means a licence granted under the new provisions;

new provisions means Part V Division 3 of this Act as in force after the commencement day.


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Environmental Protection Amendment Bill 2019

Part IX Transitional

Division 4 Transitional provisions for Environmental Protection
Amendment Act 2019

s. 133F


133F. Works approvals


- (1) Despite section **1** of the amending Act a works approval in effect under the former provisions immediately before the commencement day (the **works approval**) continues to have effect on and after the commencement day.
- (2) The provisions of the existing Act are to be taken to continue in force to the extent necessary to give effect to subsection (1).
- (3) Subsection (1) has effect subject to subsection (4) and to the former provisions as continued in force by subsection (2).
- (4) The CEO may, by notice in writing to the occupier, amend the works approval so that it conforms with the new provisions and the form of licences issued under the new provisions and, from the service of that notice, the works approval as so amended is to be taken to be a new licence granted to the occupier in respect of the works specified in the works approval as so amended and has effect accordingly.

133G. Licences

- (1) Despite section **2** of the amending Act a licence in effect under the former provisions immediately before the commencement day (the **licence**) continues to have effect on and after the commencement day.
- (2) The provisions of the existing Act are to be taken to continue in force to the extent necessary to give effect to subsection (1).
- (3) Subsection (1) has effect subject to subsection (4) and to the former provisions as continued in force by subsection (2).
- (4) The CEO may, by notice in writing to the occupier, amend the licence so that it conforms with the new provisions and the form of licences issued under the new provisions and, from the service of that notice, the licence as so amended is to be taken to be a new licence granted to the occupier in respect of the prescribed activities specified in the conditions of the licence as so amended and has effect accordingly.

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133H. Existing applications for works approvals or licences

(1) In this section —

existing application means an application for a works approval or licence made under the former provisions that has neither been withdrawn nor finally determined before the commencement day.

(2) An existing application has effect on and after the commencement day as if it were an application for a new licence made under the new provisions.

133I. Existing applications as to existing works approvals

(1) In this section —

existing application means an application for the amendment, surrender or transfer of a works approval (the *works approval*) made under the former provisions that has neither been withdrawn nor finally determined before the commencement day.

(2) Without limiting section 133F(1) and (2) those provisions apply in relation to an existing application.

(3) If an existing application has neither been withdrawn nor finally determined before the time at which the works approval becomes a new licence under section 133F(4), the existing application has effect from that time as if it were an application under the new provisions for the amendment, surrender or transfer of the new licence as the case requires.

133J. Existing applications as to existing licences

(1) In this section —

existing application means an application for the amendment, surrender or transfer of a licence (the *licence*) made under the former provisions that has neither been withdrawn nor finally determined before the commencement day.

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Division 4 Transitional provisions for Environmental Protection
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s. 133K

- (2) Without limiting section 133G(1) and (2) those provisions apply in relation to an existing application.
- (3) If an existing application has neither been withdrawn nor finally determined before the time at which the licence becomes a new licence under section 133G(4), the existing application has effect from that time as if it were an application under the new provisions for the amendment, surrender or transfer of the new licence as the case requires.

133K. Appeals in respect of refusal to grant works approvals and licences

- (1) In this section —

pending appeal means an appeal against the refusal of the CEO to grant a works approval or licence made under the former provisions that has neither been withdrawn nor finally determined before the commencement day.

- (2) A decision made before the commencement day to uphold an appeal against the refusal of the CEO to grant a works approval or licence under the former provisions is to be taken on and after the commencement day to be a decision to uphold an appeal against the refusal of the CEO to grant a licence under the new provisions.
- (3) The provisions of the existing Act are to be taken to continue in force on and after the commencement day to the extent necessary to enable —
 - (a) any pending appeal to be withdrawn or finally determined; and
 - (b) an appeal against the refusal of the CEO, before the commencement day, to grant a works approval or licence under the former provisions to be lodged and dealt with.
- (4) If under the provisions of the existing Act as continued in force by subsection (3) the Minister makes a decision to uphold an appeal against the refusal of the CEO to grant a works approval

or licence under the former provisions, that decision is to be taken to be a decision to uphold an appeal against the refusal of the CEO to grant a licence under the new provisions.

133L. Other appeals in respect of works approvals and licences

(1) In this section —

pending appeal means an appeal against a specified decision that has neither been withdrawn nor finally determined before the commencement day;

specified decision means a decision of the CEO under the former provisions —

(a) to refuse to transfer a works approval or licence; or

(b) to specify a condition in a works approval or licence; or

(c) to amend, revoke or suspend a works approval or licence.

(2) The provisions of the existing Act are to be taken to continue in force on and after the commencement day to the extent necessary to enable —

(a) any pending appeal to be withdrawn or finally determined; and

(b) an appeal against a specified decision made before the commencement day to be lodged and dealt with.

(3) If under the provisions of the existing Act as continued in force by subsection (3) the Minister makes a decision as to an appeal, the provisions of the existing Act are to be taken to continue in force to the extent necessary to enable the CEO to do anything necessary to implement and give effect to the Minister's decision.

(4) If —

(a) under the provisions of the existing Act as continued in force by subsection (3) the Minister makes a decision to uphold an appeal against a specified decision relating to a works approval or licence; and

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(b) under section 133F(4) or 133G(4) the works approval or licence is to be taken to be a new licence,

the decision on the appeal has effect, subject to any necessary modifications, in relation to the new licence.

Subdivision 4 — Other matters

133M. Referred proposals

(1) In this section —

former provisions means sections 38(1), 44(3), 45(5) and (8) and 45A(2) as in force immediately before the coming into operation of sections **1** of the amending Act.

(2) Despite the amendments made by sections **2** of the amending Act, the former provisions continue to apply to and in relation to a proposal referred to the Authority under section 38 before the coming into operation of section **3** of the amending Act.

133N. Section 100 appeals

(1) In this section —







former section means section 100 as in force immediately before the coming into operation of section **4** of the amending Act.

(2) The former section continues to apply in respect of any report in respect of a proposal published before the coming into operation of section **5** of the amending Act.

133O. Authority members

Despite the amendments made by section **6** of the amending Act, if the duties of an Authority member are being performed on a full-time basis before the coming into operation of that section the duties of that Authority member are to continue to be performed on that basis for the remainder of that Authority member's current period of office unless the Governor, on the recommendation of the Minister, determines otherwise.

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| | | | |
|--|----------------|--------------------|------------------|
|  Number: 1 2:04:00 PM Update | Author: CME WA | Subject: Highlight | Date: 13/01/2020 |
|  Number: 2 2:04:08 PM Update | Author: CME WA | Subject: Highlight | Date: 13/01/2020 |
|  Number: 3 2:04:26 PM Update | Author: CME WA | Subject: Highlight | Date: 13/01/2020 |
|  Number: 4 2:04:34 PM Update | Author: CME WA | Subject: Highlight | Date: 13/01/2020 |
|  Number: 5 2:04:53 PM Update | Author: CME WA | Subject: Highlight | Date: 13/01/2020 |
|  Number: 6 2:05:01 PM Update | Author: CME WA | Subject: Highlight | Date: 13/01/2020 |

133P. Transitional regulations

(1) In this section —

publication day, for regulations made under subsection (2), means the day on which those regulations are published in the *Gazette*;

specified means specified or described in regulations made under subsection (2);

transitional matter —

(a) means a matter that needs to be dealt with for the purpose of effecting the transition required because of the enactment of the amending Act; and

(b) includes a saving or application matter.

(2) If there is no sufficient provision in this Division for dealing with a transitional matter, the Governor may make regulations prescribing matters —

(a) required to be prescribed for the purpose of dealing with the transitional matter; or

(b) necessary or convenient to be prescribed for the purpose of dealing with the transitional matter.

(3) Regulations made under subsection (2) may provide that specified provisions of this Act —

(a) do not apply to or in relation to a specified matter; or

(b) apply with specified modifications to or in relation to a specified matter.

(4) If regulations made under subsection (2) provide that a specified state of affairs is to be taken to have existed, or not to have existed, on and after a day that is earlier than publication day for those regulations but not earlier than the day on which the relevant provision of the amending Act came into operation, the regulations have effect according to their terms.

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(5) If regulations made under subsection (2) contain a provision referred to in subsection (4), the provision does not operate so as —

(a) to affect in a manner prejudicial to a person (other than the State or an authority of the State) the rights of that person existing before publication day for those regulations; or

(b) to impose liabilities on a person (other than the State or an authority of the State) in respect of an act done or omission made before publication day for those regulations.

133Q. Interpretation Act 1984 not affected

Except to the extent that this Division or regulations made under section 133P expressly provide differently, the Interpretation Act 1984 Part V applies in relation to the amendments effected by the amending Act.

Part X — Validation

[Heading inserted: No. 27 of 2014 s. 4.]

134. Terms used

- (1) In this Part —

decision date means 19 August 2013, which is the date on which the decision in *The Wilderness Society v Minister for Environment* was delivered;

ground of invalidity means a ground of invalidity set out in section 135;

The Wilderness Society v Minister for Environment means the decision of the Supreme Court of Western Australia in *The Wilderness Society of WA (Inc) v Minister for Environment* [2013] WASC 307.

- (2) In this Part, a reference to the doing of anything includes a reference to an omission to do anything.

[Section 134 inserted: No. 27 of 2014 s. 4.]

135. Grounds of invalidity

These are the grounds of invalidity —

- (a) the participation (whether by taking part in the consideration or discussion of a matter, or voting on a matter or participating in any other way), in any purported proceedings of the Authority, by Authority members who were disqualified from participation because of —
 - (i) their direct or indirect pecuniary interest in a matter, whether or not that interest was disclosed in accordance with section 12(1) or determined under section 12(3) and whether or not a decision was purportedly made under section 13 in relation to the interest; or

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- (ii) a reasonable apprehension of bias;
- (b) the lack of a quorum at a meeting purportedly held by the Authority, where the lack of a quorum resulted from Authority members being disqualified from participation in the circumstances set out in paragraph (a)(i) or (ii);
- (c) the failure of the Authority to decide a question at a meeting purportedly held by the Authority, where —
 - (i) the failure resulted from non-compliance with the requirements of section 11(2)(e) for at least 3 Authority members to vote on the question or with any other requirement of section 11(2) with respect to voting; and
 - (ii) that non-compliance resulted from Authority members being disqualified from participation in the circumstances set out in paragraph (a)(i) or (ii);
- (d) the purported exercise of a power or duty of the Authority under a delegation made under section 19, where —
 - (i) the delegation was purportedly invoked in order to avoid the proceedings of the Authority being invalid on any of the grounds of invalidity set out in paragraphs (a) to (c); and
 - (ii) the delegation could not be invoked in the circumstances in which it was purportedly invoked, or did not authorise the exercise of the power or duty in the circumstances in which they were purportedly exercised.

[Section 135 inserted: No. 27 of 2014 s. 4.]

136. Certain proceedings of Environmental Protection Authority and other things validated

- (1) This section applies to anything done, or purportedly done, by or on behalf of the Authority before the decision date that, if this

section had not been enacted, is or may be invalid on a ground of invalidity.

- (2) The things to which this section applies are to be taken to be, and to have always been, valid and effective to the same extent as they would have been if they had not been invalidated by a ground of invalidity.
- (3) The rights, obligations and liabilities of all persons are to be taken to be, and to have always been, the same as if the things to which this section applies had been validly done.
- (4) Anything done, or purportedly done, before the *Environmental Protection Amendment (Validation) Act 2014* section 4 comes into operation as a result or consequence of, or in reliance on or in relation to, a thing to which this section applies (a **validated thing**) is as valid and effective, and is to be taken to have always been as valid and effective, as it would have been if the validated thing had been valid at the time the other thing was done or purportedly done.
- (5) This section is subject to section 137.

[Section 136 inserted: No. 27 of 2014 s. 4.]

137. Exclusions from validation

Section 136 does not validate —

- (a) any of the following things that were held to be invalid by the Supreme Court of Western Australia in *The Wilderness Society v Minister for Environment* —
 - (i) the report and recommendations of the Environmental Protection Authority on the Browse Liquefied Natural Gas Precinct strategic proposal (Report 1444, July 2012);
 - (ii) the statement of the Minister for Environment, published on 19 November 2012, that, in the event of a declaration by the Environmental Protection Authority pursuant to section 39B of the *Environmental Protection Act 1986* that it is

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a derived proposal, a proposal to do one or more of the Developments, Activities, Operations or Changes in Land Use listed in Column 2 of Table 1 in Schedule 1 of the statement, and which was identified in the Strategic Proposal to which Report 1444 relates, may be implemented (Ministerial Statement No. 917);

- (iii) the declaration made by the Environmental Protection Authority on 17 December 2012 that the proposal by Woodside Energy Ltd for the Browse LNG Downstream Development 25 Mtpa is a derived proposal identified in the Browse LNG Precinct strategic proposal, James Price Point, Shire of Broome;
- (b) anything that is invalid as a consequence of the invalidity of the things listed in paragraph (a).

[Section 137 inserted: No. 27 of 2014 s. 4.]

Schedule 1 — Penalties

[s. 99Q and 99R]

[Heading inserted: No. 14 of 1988 s. 18; amended: No. 19 of 2010 s. 4.]

Part 1 — Tier 1 offences and penalties

[Heading inserted: No. 14 of 1988 s. 18.]

Division 1 — Individuals

[Heading inserted: No. 14 of 1988 s. 18.]

| Column 1 Item | Column 2 Section | Column 3 Penalty — individual | Column 4 Daily penalty |
|--------------------|-------------------------|---|---------------------------|
| 1 | 6(7) | \$250 000 | \$50 000 |
| 2 | 47(1) or (4) | \$125 000 | \$25 000 |
| 2A | 47(4) | \$500 000 | \$100 000 |
| 3 | 48(6) | \$162 500 | \$32 500 |
| 4 | 49(2) | \$500 000 or 5 years imprisonment or both | \$100 000 |
| 5 | 49(3) | \$250 000 or 3 years imprisonment or both | \$50 000 |
| 6 | 49(4) | \$125 000 | \$25 000 |
| 7 | 50(1) | \$500 000 | \$100 000 |
| 8 | 50(2) | \$250 000 | \$50 000 |
| 8A | 50A(1) | \$500 000 or 5 years imprisonment or both | \$100 000 |
| 8B | 50A(2) | \$250 000 or 3 years imprisonment or both | \$50 000 |
| 8C | 50B(1) | \$250 000 or 3 years imprisonment or both | \$50 000 |
| 8D | 51C | \$250 000 | \$50 000 |
| 9 | 65(4a) | \$250 000 | \$50 000 |
| 10 | 69(5) | \$162 500 | \$32 500 |

Environmental Protection Amendment Bill 2019**Schedule 1**

Penalties

Part 1

Tier 1 offences and penalties

| Column 1 | Column 2 | Column 3 | Column 4 |
|----------|----------|----------------------|---------------|
| Item | Section | Penalty — individual | Daily penalty |
| 11 | 71(5) | \$250 000 | \$50 000 |
| 12 | 73A(6) | \$250 000 | \$50 000 |

[Division 1 inserted: No. 14 of 1998 s. 18; amended: No. 54 of 2003 s. 25(1), 66(1) and (2) and 115(1).]

Division 2 — Bodies corporate

[Heading inserted: No. 14 of 1988 s. 18.]

| Column 1 | Column 2 | Column 3 | Column 4 |
|--------------------|-------------------------|-----------------------------|---------------------------|
| Item | Section | Penalty — body corporate | Daily penalty |
| 1 | 6(7) | \$500 000 | \$100 000 |
| 2 | 47(1) or (4) | \$250 000 | \$50 000 |
| 2A | 47(4) | \$1 000 000 | \$200 000 |
| 3 | 48(6) | \$325 000 | \$65 000 |
| 4 | 49(2) | \$1 000 000 | \$200 000 |
| 5 | 49(3) | \$500 000 | \$100 000 |
| 6 | 49(4) | \$250 000 | \$50 000 |
| 7 | 50(1) | \$1 000 000 | \$200 000 |
| 8 | 50(2) | \$500 000 | \$100 000 |
| 8A | 50A(1) | \$1 000 000 | \$200 000 |
| 8B | 50A(2) | \$500 000 | \$100 000 |
| 8C | 50B(1) | \$500 000 | \$100 000 |
| 8D | 51C | \$500 000 | \$100 000 |
| 9 | 65(4a) | \$500 000 | \$100 000 |
| 10 | 69(5) | \$325 000 | \$65 000 |
| 11 | 71(5) | \$500 000 | \$100 000 |
| 12 | 73A(6) | \$500 000 | \$100 000 |

[Division 2 inserted: No. 14 of 1998 s. 18; amended: No. 54 of 2003 s. 25(1), 66(3) and (4) and 115(2).]

Part 2 — Tier 2 offences and penalties*[Heading inserted: No. 14 of 1988 s. 18.]***Division 1 — Individuals***[Heading inserted: No. 14 of 1988 s. 18.]*

| Column 1 | Column 2 | Column 3 | Column 4 |
|---------------|-------------------|----------------------|---------------------|
| Item | Section | Penalty — individual | Daily penalty |
| 1 | 41A(1) | \$62 500 | \$12 500 |
| 1B | 49(5) | \$62 500 | \$12 500 |
| 1CA | 49A(2) | \$62 500 | Nil |
| 1CB | 49A(3) | \$62 500 | Nil |
| 1C | 50B(2) | \$125 000 | \$25 000 |
| 1D | 50D(2) | \$50 000 | \$10 000 |
| 1E | 51J(1) | \$62 500 | \$12 500 |
| <u>2</u> | <u>53A(1)</u> | <u>\$62 500</u> | <u>\$12 500</u> |
| <u>3</u> | <u>53B(1)</u> | <u>\$62 500</u> | <u>\$12 500</u> |
| <u>4</u> | <u>62</u> | <u>\$62 500</u> | <u>\$12 500</u> |
| <u>5</u> | <u>63(3)</u> | <u>\$62 500</u> | <u>\$12 500</u> |
| 2 | 52 | \$50 000 | \$10 000 |
| 3 | 53(1) | \$50 000 | Nil |
| 4 | 53(2) | \$50 000 | Nil |
| 5 | 55(1) | \$62 500 | \$12 500 |
| 5A | 55(1a) | \$62 500 | \$12 500 |
| 6 | 56 | \$50 000 | \$10 000 |
| 7 | 58(1) | \$62 500 | \$12 500 |
| 7A | 58(1a) | \$62 500 | \$12 500 |
| 8 | 61(4) | \$62 500 | \$12 500 |
| 9 | 65(5) | \$62 500 | \$12 500 |
| 10 | 73A(7) | \$62 500 | \$12 500 |
| 11 | 75(2) | \$62 500 | \$12 500 |

Environmental Protection Amendment Bill 2019**Schedule 1**

Penalties

Part 2

Tier 2 offences and penalties

| Column 1 | Column 2 | Column 3 | Column 4 |
|---------------------|------------------------|--------------------------|--------------------------|
| Item | Section | Penalty — individual | Daily penalty |
| 11A | 86B(3) | \$62 500 | \$12 500 |
| 11B | 86O(1) | \$62 500 | \$12 500 |
| 11C | 86P(2) | \$62 500 | \$12 500 |
| 12 | 92C(3) | \$62 500 | Nil |
| 13 | 92E(1) | \$62 500 | Nil |
| 14 | 99X(4) | \$62 500 | Nil |
| 15 | 111A(1) | \$62 500 | \$12 500 |

[Division 1 inserted: No. 14 of 1998 s. 18; amended: No. 54 of 2003 s. 25(2), 66(5)-(7), 85(1), (2) and (5), 88(1), 115(3) and 132(2); No. 48 of 2010 s. 11(1).]

Division 2 — Bodies corporate

[Heading inserted: No. 14 of 1988 s. 18.]

| Column 1 | Column 2 | Column 3 | Column 4 |
|-------------------|---------------------------------------|---------------------------|--------------------------|
| Item | Section | Penalty — body corporate | Daily penalty |
| 1 | 41A(1) | \$125 000 | \$25 000 |
| 1B | 49(5) | \$125 000 | \$25 000 |
| 1CA | 49A(2) | \$125 000 | Nil |
| 1CB | 49A(3) | \$125 000 | Nil |
| 1C | 50B(2) | \$250 000 | \$50 000 |
| 1D | 50D(2) 50D | \$100 000 | \$20 000 |
| 1E | 51J(1) | \$125 000 | \$25 000 |
| 2 | 53A(1) | \$125 000 | \$25 000 |
| 3 | 53B(1) | \$125 000 | \$25 000 |
| 4 | 62 | \$125 000 | \$25 000 |
| 5 | 63(3) | \$125 000 | \$25 000 |
| 2 | 52 | \$100 000 | \$20 000 |

Environmental Protection Amendment Bill 2019

Penalties
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Schedule 1
Part 2

| Column 1 Item | Column 2 Section | Column 3 Penalty — body corporate | Column 4 Daily penalty |
|------------------|---------------------|--------------------------------------|---------------------------|
| 3 | 53(1) | \$100 000 | Nil |
| 4 | 53(2) | \$100 000 | Nil |
| 5 | 55(1) | \$125 000 | \$25 000 |
| 5A | 55(1a) | \$125 000 | \$25 000 |
| 6 | 56 | \$100 000 | \$20 000 |
| 7 | 58(1) | \$125 000 | \$25 000 |
| 7A | 58(1a) | \$125 000 | \$25 000 |
| 8 | 61(4) | \$125 000 | \$25 000 |
| 9 | 65(5) | \$125 000 | \$25 000 |
| 10 | 73A(7) | \$125 000 | \$25 000 |
| 11 | 75(2) | \$125 000 | \$25 000 |
| 11A | 86B(3) | \$125 000 | \$25 000 |
| <u>11B</u> | <u>86O(1)</u> | <u>\$125 000</u> | <u>\$25 000</u> |
| <u>11C</u> | <u>86P(2)</u> | <u>\$125 000</u> | <u>\$25 000</u> |
| 12 | 92C(3) | \$125 000 | Nil |
| 13 | 92E(1) | \$125 000 | Nil |
| 14 | 99X(4) | \$125 000 | Nil |
| 15 | 111A(1) | \$125 000 | \$25 000 |

[Division 2 inserted: No. 14 of 1998 s. 18; amended: No. 54 of 2003 s. 25(3), 66(8) and (9), 85(3)-(5), 88(2), 115(4) and 132(3); No. 48 of 2010 s. 11(2).]

Division 3 — Individuals and bodies corporate

[Heading inserted: No. 14 of 1988 s. 18.]

| Column 1 Item | Column 2 Section | Column 3 Penalty — individual or body corporate | Column 4 Daily penalty |
|------------------|---------------------|--|---------------------------|
|------------------|---------------------|--|---------------------------|

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Penalties

Part 2

Tier 2 offences and penalties

| Column 1 Item | Column 2 Section | Column 3 Penalty — individual or body corporate | Column 4 Daily penalty |
|------------------|--|---|---------------------------|
| 1 | 47(3) | \$50 000 | Nil |
| 2 | 51 | \$25 000 | \$5 000 |
| 3 | 61A(3) 62A (2) | \$25 000 | \$5 000 |
| 4 | 67 | \$10 000 | Nil |
| 5 | 72(1) | \$50 000 | \$10 000 |
| 6 | 72(4) | \$50 000 | \$10 000 |
| 7 | 76(1) | \$25 000 | \$5 000 |
| 8 | 76(2) | \$25 000 | \$5 000 |
| 9 | 81(2) | \$25 000 | Nil |
| 10 | 82(2) | \$25 000 | \$5 000 |
| 11 | 83 | \$25 000 | Nil |
| 12 | 86(1) | \$10 000 | \$2 000 |
| 13 | 86(2) | \$10 000 | \$2 000 |
| 14 | 86(3) | \$10 000 | \$2 000 |
| 15 | 90(2) | \$25 000 | \$5 000 |
| 16 | 91(3) | \$25 000 | \$5 000 |
| 17 | 92(4) | \$25 000 | \$5 000 |
| 18 | 93 | \$25 000 | Nil |
| 19 | 95(2) | \$25 000 | \$5 000 |
| 20 | 96(3) | \$10 000 | \$2 000 |
| 21 | 112 | \$100 000 \$50 000 | Nil |
| 22 | 120 | \$100 000 \$50 000 | Nil |

[Division 3 inserted: No. 14 of 1998 s. 18; amended: No. 54 of 2003 s. 85(6).]

Part 3 — Tier 3 offences and penalties*[Heading inserted: No. 14 of 1988 s. 18.]*

| Column 1 Item | Column 2 Section | Column 3 Penalty — individual or body corporate | Column 4 Daily penalty |
|----------------------|-----------------------|---|---------------------------|
| 1 | 77(1) | \$5 000 | Nil |
| 2 | 77(2) | \$5 000 | Nil |
| 3 | 77(3) | \$5 000 | Nil |
| 4 | 78(1) | \$5 000 | Nil |
| 5 | 78(3) | \$5 000 | Nil |
| 6 | 79(1) | \$5 000 | Nil |
| 7 | 80 | \$5 000 | Nil |
| 8 | 84(1) | \$5 000 | Nil |
| 9 | 85(1) | \$5 000 | Nil |
| 10AA | 90(2) | \$5 000 | \$1 000 |
| 10A | 91A(2) | \$5 000 | Nil |
| 10 | 97(2) | \$5 000 | \$1 000 |
| 11 | 110H(6) | \$5 000 | Nil |

[Part 3 inserted: No. 14 of 1998 s. 18; amended: No. 48 of 2010 s. 11(3).]

**Schedule 2 — Matters in respect of which regulations may
be made**

[s. 123(2)]

[Heading amended: No. 19 of 2010 s. 4.]

1. In this Schedule —
specified means specified in regulations made under section 123.
2. The fees to apply under this Act, including, without limiting sections 43, 45 and 45A of the *Interpretation Act 1984*, the following —
 - (a) the time at which, or the periods for or during which, fees are to be paid;
 - (b) the structure of fees;
 - (c) the basis on which a fee is to be calculated;
 - (d) interest on unpaid fees;
 - (e) penalties for late payment or underpayment of fees;
 - (f) recovery of fees;
 - (g) refunding of fees.
- 2A. Without limiting item 2, in the case of a ~~works approval or~~ licence under Part V or a licence, permit, approval or exemption under the regulations (an ***authorisation***) —
 - (a) prescribing fees that are payable before or when the authorisation is granted, issued or given and fees that are payable at prescribed intervals or in prescribed circumstances during the currency of the authorisation;
 - (b) providing for the authorisation to cease to have effect if a fee is not paid in accordance with the regulations.
3. The taking of measurements and analysis of substances and things for the purposes of this Act.
4. The conduct and methods of testing the extent and effects of an emission, the equipment to be used for the purpose of that testing, and the persons who are authorised to use that equipment.

5. The matters that may be set out in a certificate or report relating to —
- (a) the taking, or results, of measurements referred to in item 3;
 - (b) the conduct, method, or results, of analysis referred to in item 3 or testing referred to in item 4;
 - (c) the equipment for such measurements, analysis or testing;
 - (d) the persons taking such measurements, conducting such tests or analysis or testing equipment for such measurements, analysis or testing,
- and the evidential status and probative value of those matters.
- 5A. **1** establishing or recognising a scheme or system for the accreditation of persons as environmental practitioners and authorising the CEO, the Authority or the Minister to require a certificate, report or other document required or permitted to be submitted under this Act to be certified in accordance with the regulations by a person so accredited.
6. The facts by which and the manner in which it may be proved that any noise, odour or electromagnetic radiation emitted from any source does not comply with any standard prescribed in respect of that source by or under this Act.
7. Limiting an emission in relation to any area, premises, act or thing.
8. The standards for determining when any matter, act or thing is poisonous, noxious, objectionable, detrimental to health or within any other description referred to in this Act, which standards may be different in different localities.
9. Prohibiting the discharge into the environment of any matter, whether liquid, solid, gaseous or radioactive, and prohibiting or regulating the use of any specified chemical substance or fuel.
10. Prohibiting either generally or in specified circumstances or subject to specified conditions an emission into the environment.
11. Prescribing ambient standards and emission standards and specifying the maximum permissible concentrations of any matter that may be present in or discharged into the environment.
12. Prescribing noise emission standards for different kinds of premises and equipment.

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📄 Number: 1 Author: CME WA Subject: Highlight Date: 16/01/2020
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Proposed amendments related to accreditation should be removed.

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13. The times within which specified noise emission levels may be exceeded or shall not be exceeded.
 14. Prohibiting or regulating the emission or transmission of noise, odour or electromagnetic radiation from ~~premises, whether or not those premises are prescribed premises or a public place.~~ premises or a place.
 15. Prohibiting or regulating the emission or transmission of noise, odour or electromagnetic radiation in public places.
 16. Requiring the means to be used for the prevention, and for counteracting the effect, of pollution or environmental harm in relation to any area, premises, act or thing, including the laying down of minimum requirements.
 17. Prohibiting or regulating any conduct, operation or activity that is capable of causing pollution or environmental harm.
 18. Prohibiting the use of any equipment capable of emitting noise that does not meet any prescribed noise emission standard in any respect or regulating the construction, installation or operation thereof so as to prevent or minimise the emission of noise.
 - 18A. Regulating the seizure and storage of things under section 92A and the sale, preservation, treatment and other ways of dealing with those things.
 19. Regulating the construction, installation or operation of any premises or equipment or the repair or maintenance of any vehicle or vessel so as to prevent or minimise pollution or environmental harm.
 20. Requiring the installation and use in connection with any equipment of any other equipment to prevent pollution or environmental harm and prohibiting the operation of any specified equipment unless there is installed and operated, in connection with the specified equipment, any other equipment to prevent pollution or environmental harm.
 21. Requiring any equipment or the packaging thereof to be fitted or marked with a plate, label or other marking and prescribing the manner in which the plate, label or other marking is to be fitted or marked.
 22. Prescribing types of plates, labels and other markings and the information to be contained thereon or therein.

- 23. Prohibiting the removal or defacing of any plate, label or other marking of a prescribed type required to be fitted or marked to or on any equipment or the packaging thereof.
- 24. The enforcement and implementation of approved policies or the identification of any portion of the environment.
- 25. Prescribing standards and criteria for the implementation of any approved policy.
- 25A. Identifying an area of the State to which an approved policy applies, or does not apply.
- 25B. Supplementing an approved policy by providing for any matter referred to in section 35(2).
- 25C. Prescribing methods for measuring, predicting or evaluating the effectiveness of an approved policy in achieving and maintaining the environmental quality objectives specified in the policy.
- 25D. Prescribing procedures for consultation with respect to the making of regulations in relation to a matter referred to in item 24, 25, 25A, 25B or 25C.
- 26. Prescribing a specified activity as a prescribed activity for the purposes of Part V, either generally or in circumstances specified for that category of activity.
- 26A. Prescribing transitional provisions in relation to the licensing of prescribed activities.
- ~~26. Prescribing any premises or class of premises as prescribed premises for the purposes of Part V.~~
- 27. Regulating the establishment of sites for the disposal of solid or liquid wastes on or in land and the use of any such sites, whether or not established after the commencement of this item.
- 28. The control, prevention or abatement of pollution or environmental harm generally.
- 29. Without limiting the generality of section 6 or of section 43(8)(d) of the *Interpretation Act 1984*, exempting any persons, premises or equipment or class of persons, premises or equipment or any category, type, volume or kind of waste or source of noise from all or any of the provisions of

this Act, and specifying circumstances in which and conditions subject to which such an exemption shall apply.

- 30. Prohibiting the sale, use or operation of an article except in accordance with specified conditions relating to the emission or transmission of noise, odour or electromagnetic radiation from the article when in use or operation and, in particular prohibiting the sale, use or operation of an article unless it is fitted with specified noise, odour or electromagnetic radiation control equipment.
- 30A. Prohibiting or regulating the manufacture, sale or distribution for sale of solid fuel burning equipment, or solid fuel, of a prescribed class or description.
- 30B. Specifying the minimum and maximum permissible concentrations or amounts of constituents of any matter that may be present in any substance or thing.
- 30C. Prohibiting or regulating the manufacture, sale, distribution for sale, use or operation of any prescribed substance or thing or any substance or thing of a prescribed class or description.
- 31. Prohibiting the carrying on of a trade, industry or process except in accordance with such conditions relating to the emission or transmission of noise, odour or electromagnetic radiation arising in the course of the carrying on of the trade, industry or process as are specified.
- 32. Prohibiting or regulating the use or operation of any article, or the carrying on of any trade, industry or process, at any specified times.
- 33. Regulating and controlling the collection, transport, storage and disposal of waste and specifying conditions for the re-use thereof.
- 33A. Requiring any information or documents supplied for the purposes of the Act to be verified by statutory declaration.
- 33B. Making provision for or with respect to guidelines to be observed in relation to the content of financial assurance requirements.
- 34. Prescribing administrative procedures for the purposes referred to in section 122(1)(a).
- 35. Prescribing procedures in respect of appeals under Part VII.
- 35A. Requiring things to be done or information to be provided under this Act in a prescribed manner or prescribed form.

36. The keeping, inspection and production of records and registers under this Act.

36A. The keeping and production of returns and other information by the holder of a licence ~~a licensee~~ in relation to the receipt of waste.

36B. Making provision with respect to —

- (a) how information is to be recorded, kept, produced, made available for public inspection and published under this Act; and
- (b) measures and procedures for maintaining confidentiality and dealing with intellectual property issues in respect of information including —
 - (i) requirements as to when and how requests that information not be recorded, kept, produced, made available for public inspection or published may be made; and
 - (ii) procedures for receiving and dealing with those requests; and
 - (iii) requirements as to the form in which information is to be submitted under this Act; and
 - (iv) a requirement that a person providing information under this Act enter into an agreement in a prescribed form regarding the intellectual property in, and use of, that information

37. Creating offences under the regulations and penalties for the commission thereof not exceeding \$5 000.

[Schedule 2 amended: No. 14 of 1998 s. 19, 21 and 36; No. 54 of 2003 s. 26, 67, 86, 89, 96 and 138; No. 36 of 2007 s. 100.]


**Schedule 3 — Transitional provisions related to
*Environmental Protection Act 1971***

[s. 126]

[Heading amended: No. 19 of 2010 s. 4.]

1. Any order made under section 8 of the repealed Act and in force immediately before the coming into operation of this clause ceases to have effect on that coming into operation.
2. Every person holding office as an Authority member within the meaning of the repealed Act immediately before the coming into operation of this clause shall on that coming into operation be deemed to have been appointed under section 7 to be an Authority member for the remainder of the period for which he would, but for the repeal of the repealed Act, have held office as an Authority member within the meaning of the repealed Act, and may from time to time be reappointed under that section.
3. Every person appointed under section 10(2) of the repealed Act and still so appointed immediately before the coming into operation of this clause shall on that coming into operation cease to be so appointed.
4. The Minister shall under section 7 appoint one of the persons deemed by clause 2 to have been appointed under that section to be Authority members to be the Chairman of the Authority and another of those persons to be the Deputy Chairman of the Authority.
5. The Department of Conservation and Environment referred to in section 12 of the repealed Act is abolished.
6. The office of Director of Conservation and Environment referred to in section 13 of the repealed Act is abolished.
7. The Council within the meaning of the repealed Act is abolished.
8. Every Council member within the meaning of the repealed Act, every person appointed under section 18 of the repealed Act and every deputy of such a Council member appointed under section 21 of the repealed Act who holds office, or whose appointment subsists, immediately before the coming into operation of this clause ceases to hold office or ¹ appointment terminates, as the case requires, on that coming into operation.


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Change 'his' to 'their' or 'his / her'

9. The appointment of a committee and of the members thereof under section 27 of the repealed Act subsisting immediately before the coming into operation of this clause shall terminate on that coming into operation.
10. The establishment of a committee under section 30(4) of the repealed Act subsisting immediately before the coming into operation of this clause shall terminate on that coming into operation.
11. Any person invited to act in an advisory capacity to the Authority under section 30(4) of the repealed Act and so acting immediately before the coming into operation of this clause shall on that coming into operation cease so to act.
12. Any model by-laws published under section 30(4) of the repealed Act and in force immediately before the coming into operation of this clause shall on that coming into operation cease to be in force.
13. Any regulations made under section 30(4) of the repealed Act and in force immediately before the coming into operation of this clause shall on that coming into operation cease to be in force.
14. Any criteria established and developed under section 30(4)(j), and any standards and criteria and methods of sampling and testing specified under section 30(4)(k), of the repealed Act and subsisting immediately before the coming into operation of this clause shall on that coming into operation continue to subsist for the purposes of this Act —
 - (a) unless inconsistent with any standards prescribed for the purposes of this Act; or
 - (b) if not inconsistent within the meaning of paragraph (a), until abolished by the CEO.
15. A delegation made under section 31 of the repealed Act and in force immediately before the coming into operation of this clause shall on that coming into operation be deemed to have been made under section 19 and may be amended or revoked accordingly.
16. A request made under section 54(1) of the repealed Act and not complied with before the coming into operation of this clause shall be deemed on that coming into operation to be a requirement made under section 38(3).
17. A matter referred to the Minister for Conservation and Environment under section 55(1) of the repealed Act and not reported on to 1 by the Authority before the coming into operation of this clause shall be deemed on that coming into operation to be a proposal referred to the Authority under section 38.

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Change 'him' to 'him / her' or 'them'

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18. A matter referred to the Authority under section 56(1) of the repealed Act and not reported on by the Authority to the Minister for Conservation and Environment before the coming into operation of this clause shall be deemed on that coming into operation to be a proposal referred to the Authority under section 38.
19. A requirement made under section 59(2) of the repealed Act and not complied with before the coming into operation of this clause shall be deemed on that coming into operation to be a requirement contained in a pollution abatement notice served on the person whose duty it was to comply with the first-mentioned requirement.
20. (1) Subject to subitem (2), in any —
- (a) written law;
 - (b) agreement, whether in writing or not;
 - (c) deed or other instrument,
- unless the context is such that it would be incorrect or inappropriate, a reference to —
- (d) an Environmental Appeal Board shall be construed as a reference to an appeals committee; or
 - (e) the Conservation and Environment Council shall be construed as a reference to the Authority; or
 - (f) the Department shall be construed as a reference to the Authority; or
 - (g) the Director shall be construed as a reference to the CEO; or
 - (h) the repealed Act or to a provision thereof shall be construed as a reference to this Act or to the equivalent provision thereof, if any, as the case requires.
- (2) The Minister, by notice published in the *Gazette*, may determine that a reference in any written law, agreement, deed or other instrument referred to in subitem (1) to “the Department of Conservation and Environment” or “the Department” shall be construed as a reference to the Department of the Public Service of the State through which this Act is administered, and the determination shall have effect accordingly.

[Schedule 3 amended: No. 54 of 2003 s. 139 and 140(2).]

**Schedule 4 — Transitional provisions not related to
Environmental Protection Act 1971**

[s. 127]

[Heading amended: No. 19 of 2010 s. 4.]

1. If an occupier of premises has, before the coming into operation of this clause, commenced work in respect of which a works approval would have been required by virtue of section 52 or 53, had that section then been in operation, and not completed that work immediately before that coming into operation, that occupier may, notwithstanding that section, complete that work if that occupier —
 - (a) notifies the CEO of that work within 14 days of that coming into operation; and
 - (b) if required to do so by the CEO by notice in writing served on that occupier, supplies to the CEO such plans, specifications and other information as are specified in that notice within such period as is so specified.
2. The Air Pollution Advisory Committee established under section 7 of the *Clean Air Act 1964*³ is abolished.
3. A person whose services were immediately before the coming into operation of this clause co-opted under section 22(2) of the *Clean Air Act 1964*³ shall be deemed on that coming into operation to be a person whose services are made use of under section 24(a).
4. An inspector appointed under section 22(3) of the *Clean Air Act 1964*³ and holding office as such immediately before the coming into operation of this clause shall on that coming into operation be deemed to have been appointed to be an inspector under section 88.
5. A person who has applied for a licence or a renewal or transfer thereof under section 24 of the *Clean Air Act 1964*³ and whose application is awaiting determination immediately before the coming into operation of this clause shall be deemed on that coming into operation to have applied under section 59 for, or for the renewal or transfer of, a licence of the same kind as the first-mentioned licence.
6. A person who is immediately before the coming into operation of this clause the holder of a licence under the *Clean Air Act 1964*³ shall on that coming into operation be deemed to be the holder of a licence under Part V —
 - (a) of the same kind as the first-mentioned licence; and

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Transitional provisions not related to Environmental Protection Act 1971

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- (b) valid for the remainder of the period for which the first-mentioned licence would have been valid had the *Clean Air Act 1964*³ not been repealed; and
 - (c) subject to the same conditions as those to which the first-mentioned licence was subject.
 - 7. An exemption granted under section 33 of the *Clean Air Act 1964*³ and in force immediately before the coming into operation of this clause shall on that coming into operation be deemed to be an exemption granted under section 6.
 - 8. If the occupier of any premises has, before the coming into operation of this clause, applied for approval under section 34 of the *Clean Air Act 1964*³ in respect of any works on those premises, in respect of which works a works approval would have been required by virtue of section 52 or 53, had that section then been in operation, and that application has not, immediately before that coming into operation, been granted or refused, that application shall be deemed to be an application for a works approval under section 54 and shall be dealt with accordingly.
 - 9. A direction given under section 27A(4)⁵ of the *Rights in Water and Irrigation Act 1914* and not complied with before the coming into operation of this clause shall, notwithstanding that coming into operation, continue in operation until complied with as if Part IIIA of that Act had not been repealed.
 - 10. A notice in writing given under section 27AA(1)⁶ of the *Rights in Water and Irrigation Act 1914* and not complied with or cancelled before the coming into operation of this clause shall, notwithstanding that coming into operation, continue in operation until complied with or cancelled as if Part IIIA of that Act had not been repealed.
 - 11. An application for a disposal licence under section 27B of the *Rights in Water and Irrigation Act 1914* made before the coming into operation of this clause and not granted or refused before that coming into operation shall be deemed on that coming into operation —
 - (a) if that application is for a disposal licence in respect of works or premises, to be an application for a works approval; or
 - (b) if that application is for a disposal licence in respect of the discharge of waste from premises, to be an application for a licence,and shall be dealt with accordingly under this Act.

12. If the occupier of any premises has, before the coming into operation of this clause, been granted —
- (a) an approval under section 34 of the *Clean Air Act 1964*³; or
 - (b) a disposal licence under section 27B of the *Rights in Water and Irrigation Act 1914*,

in respect of any works on those premises, in respect of which works a works approval would have been required by virtue of section 52 or 53, had that section then been in operation, and those works have not, immediately before that coming into operation, been commenced, that approval or disposal licence shall be deemed to be a works approval granted to that occupier in respect of those works and subject to the same conditions, if any, as the conditions to which that approval or disposal licence was subject.

13. The occupier of any premises in respect of the discharge of waste from which —
- (a) immediately before the coming into operation of this clause that occupier should have been, but was not, the holder of —
 - (i) an approval under section 34, or a permit under section 39B, of the *Clean Air Act 1964*³; or
 - (ii) a disposal licence under section 27B of the *Rights in Water and Irrigation Act 1914*;
 - and
 - (b) on the coming into operation of this clause that occupier should be a licensee,

shall within the period of 3 months after the coming into operation of this clause apply for a licence under section 57 and does not commit —

- (c) within that period; and
- (d) if he makes such an application within the period referred to in paragraph (a), while that application is awaiting determination,

any offence under section 61.

14. If immediately before the coming into operation of this clause —
- (a) a permit granted under section 39B of the *Clean Air Act 1964*³; or

- (b) a disposal licence granted under section 27B of the *Rights in Water and Irrigation Act 1914*,

in respect of the discharge of waste was in force, that permit or disposal licence shall be deemed to be a licence granted under this Act in respect of that discharge and may be amended or revoked by the CEO accordingly, and any fee payable under that Act in respect of that permit or disposal licence shall continue to be payable in respect of the licence deemed to be granted under this Act in respect of that discharge while that licence subsists.

15. A declaration made under section 27G⁶ of the *Rights in Water and Irrigation Act 1914* and in force immediately before the coming into operation of this clause shall be deemed on that coming into operation to be an exemption granted under section 6 in respect of the subject matter of that declaration.
16. Any regulations made under Part IIIA⁶ of the *Rights in Water and Irrigation Act 1914* and in force immediately before the coming into operation of this clause shall be deemed on that coming into operation to have been made under this Act and may be repealed or amended accordingly.
17. A notice served under section 41 of the *Clean Air Act 1964*³ and not complied with before the coming into operation of this clause shall be deemed on that coming into operation to be a requirement made under section 90 or 95, as the case requires.
18. A prohibition made by Order in Council under section 43 of the *Clean Air Act 1964*³ and in force immediately before the coming into operation of this clause shall continue in force notwithstanding that coming into operation as if that Act had not been repealed.
19. An appeal pending under section 45 of the *Clean Air Act 1964*³ immediately before the coming into operation of this clause shall notwithstanding that coming into operation be dealt with and finally determined as if that Act had not been repealed.
20. Any regulations made under section 53 of the *Clean Air Act 1964*³ and in force immediately before the coming into operation of this clause shall be deemed on that coming into operation to be regulations made under section 123.

21. If, immediately before the coming into operation of this clause, an exemption granted under section 6 of the *Noise Abatement Act 1972*⁷ in respect of the emission of noise was in force, that exemption shall be deemed to be an exemption granted under section 6 in respect of that emission and any fee payable under that Act in respect of that exemption shall continue to be payable in respect of the exemption granted under section 6 in respect of that emission while that exemption subsists.
22. Notwithstanding anything in clause 13, 14 or 21, any discharge or emission permitted by that clause to continue after the coming into operation of that clause shall be so permitted only insofar as that discharge or emission complies with any approved policy and with any prescribed standard.
23. Every —
- (a) notice served or given under section 33, 35, 38 or 39 of the *Clean Air Act 1964*³; or
 - (b) abatement notice served under section 26, nuisance order made under section 27 or noise abatement direction given under section 33B, of the *Noise Abatement Act 1972*⁷,
- (in this clause called the **relevant Act**) which was in force or pending immediately before the coming into operation of this clause shall on that coming into operation continue in force or may be prosecuted to its conclusion, as the case requires, as if that section had not been repealed and the provisions of the relevant Act shall apply to that notice, abatement notice, nuisance order or noise abatement direction accordingly.
24. A delegation made under section 12A of the *Noise Abatement Act 1972*⁷ to a person performing functions unrelated to occupational health, safety or welfare and in force immediately before the coming into operation of this clause shall on that coming into operation be deemed to be revoked.
25. A committee established under section 20 of the *Noise Abatement Act 1972*⁷ in respect of matters unrelated to occupational health, safety or welfare and in existence immediately before the coming into operation of this clause shall on that coming into operation be abolished.
26. A person invited under section 20 of the *Noise Abatement Act 1972*⁷ to act in an advisory capacity unrelated to occupational health, safety or welfare to the Noise Abatement Advisory Committee established by section 13 of that Act and so acting immediately before the coming into

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operation of this clause shall on that coming into operation cease so to act.

27. A person who was immediately before the coming into operation of this clause an inspector authorised, or a member of a prescribed class of inspectors authorised, under section 33A(2) of the *Noise Abatement Act 1972*⁷ shall on that coming into operation be deemed to have been appointed an authorised person under section 87.
28. A person who was immediately before the coming into operation of this clause an inspector (other than a workplace inspector) appointed under section 34 of the *Noise Abatement Act 1972*⁷ shall on that coming into operation be deemed to have been appointed an inspector under section 88.
29. Any by-laws or model by-laws made under section 45 of the *Noise Abatement Act 1972*⁷ and in force immediately before the coming into operation of this clause shall on that coming into operation cease to have effect.
30. Any regulations made under section 48 of the *Noise Abatement Act 1972*⁷ in respect of the appointment of inspectors (other than workplace inspectors) or any other matter unrelated to occupational health, safety or welfare and in force immediately before the coming into operation of this clause shall on that coming into operation be deemed to have been made under section 123.

[Schedule 4 amended: No. 57 of 1997 s. 54(10); No. 54 of 2003 s. 140(2).]

Schedule 5 — Principles for clearing native vegetation

[s. 51A]

[Heading inserted: No. 54 of 2003 s. 116.]

1. Principles

Native vegetation should not be cleared if —

- (a) it comprises a high level of biodiversity; or
- (b) it comprises the whole or a part of, or is necessary for the maintenance of, a significant habitat for fauna; or
- (c) it includes, or is necessary for the continued existence of, threatened flora; 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.

[Clause 1 inserted: No. 54 of 2003 s. 116; amended: No. 24 of 2016 s. 314(2).]

2. Terms used

In this Schedule —

biodiversity has the meaning given in the *Biodiversity Conservation Act 2016* section 5(1);

conservation area means a conservation park, national park, nature reserve, marine nature reserve, marine park or marine management

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area within the meaning of the *Conservation and Land Management Act 1984* or any other land or waters reserved, protected or managed for the purpose of, or purposes including, nature conservation;

fauna has the meaning given in the *Biodiversity Conservation Act 2016* section 5(1);

~~**threatened ecological community** has the meaning given in the *Biodiversity Conservation Act 2016* section 5(1);~~

threatened ecological community means —

(a) a threatened ecological community as defined in the *Biodiversity Conservation Act 2016* section 5(1); or

(b) ¹ any other ecological community listed, designated or declared as threatened, endangered or vulnerable under or for the purposes of a written law; or

(c) a listed threatened ecological community as defined in the ² *Commonwealth Environment Act* section 528;

threatened flora has the meaning given in the *Biodiversity Conservation Act 2016* section 5(1);

watercourse has the same meaning as it has in the *Rights in Water and Irrigation Act 1914*;

wetland means an area of seasonally, intermittently or permanently waterlogged or inundated land, whether natural or otherwise, and includes a lake, swamp, marsh, spring, dampland, tidal flat or estuary.

[Clause 2 inserted: No. 54 of 2003 s. 116; amended: No. 24 of 2016 s. 314(3) and (4).]

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**Schedule 6 — Clearing for which a clearing permit is
not required**

[Heading inserted: No. 54 of 2003 s. 104.]

[s. 51C]

1. Clearing that is done in order to give effect to a requirement to clear under a prescribed enactment ~~written law.~~
2. Clearing that is done —
 - (a) in the implementation of a proposal in accordance with an implementation agreement or decision; or
 - (b) in the case of a proposal that —
 - (i) was made under an assessed scheme; and
 - (ii) because of section 48I(2), was not referred to the Authority,
in the implementation of the proposal in accordance with a ~~subdivision approval,~~ a development approval or a planning approval given by the responsible authority; or
 - (c) in accordance with —
 - (i) a prescribed standard; or
 - ~~(ii) a works approval; or~~
 - (iii) a licence; or
 - (iv) a requirement contained in a closure notice, an environmental protection notice or a prevention notice; or
 - (v) an approved policy; or
 - (vi) a declaration under section 6; or
 - (vii) an exemption under section 75; or
 - (viii) a licence, permit, approval or exemption granted, issued or given under the regulations;or
 - (d) in the exercise of any power conferred under this Act.
3. Clearing by the Department, within the meaning of the *Conservation and Land Management Act 1984*, in the performance of its function under section 33(1)(a) of that Act of managing land, but, in the case

of land referred to in section 33(1)(a)(i), only if the management is carried out in accordance with section 33(3).

4. Clearing consisting of the taking of flora —

- (a) as authorised by a licence under the *Biodiversity Conservation Act 2016*; or
- (b) as authorised by an authorisation under the *Biodiversity Conservation Act 2016* section 40; or
- (c) by a person referred to in the *Biodiversity Conservation Act 2016* section 171(2) for the purposes of supply in accordance with a licence under that Act.

[5, 6. *deleted*]

7. Clearing under the *Forest Products Act 2000*, of vegetation maintained, or established and maintained, under section 10(1)(g) of that Act.

8. Clearing under a production contract or road contract entered into and having effect under the *Forest Products Act 2000*.

9. Clearing in accordance with a subdivision approval given by the responsible authority under the *Planning and Development Act 2005*, including —

- (a) clearing for the purposes of any development that is deemed by section 157 of that Act to have been approved by the responsible authority; and
- (b) clearing in any building envelope described in the approved plan or diagram.

10. Clearing that is done —

- (a) as permitted under section 17(5); or
- (b) in accordance with a permit obtained under section 18; or
- (c) in accordance with an exemption granted under section 22C; or
- (d) under [section 22\(2\), 23, 26A, 33\(4\), 39\(1\)\(d\)](#) ~~section 22(2), 23, 26A, 39(1)(d)~~ or 44(1)(c); or
- (e) as authorised by a proclamation under [section 26;](#) ~~or section 26;~~
- (f) [to comply with a notice given under section 33\(1\),](#)

of the *Bush Fires Act 1954*.

11A. Clearing that is done by the occupier of land, or an energy operator, under the *Energy Operators (Powers) Act 1979* section 54.

11. Clearing that is done under section 34(a), (c) or (h) of the *Fire Brigades Act 1942*.
12. Clearing that is done for fire prevention or control purposes or other fire management works on Crown land, within the meaning of the *Land Administration Act 1997*, by the FES Commissioner as defined in the *Fire and Emergency Services Act 1998* section 3.
13. Clearing caused by the grazing of stock on land under a pastoral lease within the meaning of the *Land Administration Act 1997* as long as that grazing is not in breach of —
 - (a) that Act; or
 - (b) the pastoral lease; or
 - (c) any relevant condition set or determination made by the Pastoral Board under Part 7 of that Act.
14. Clearing of aquatic vegetation that occurs under the authority of a licence or permit within the meaning of the *Fish Resources Management Act 1994*.
15. Clearing that is done by the owner or occupier of land to comply with a notice given under the *Local Government Act 1995* section 3.25(1) in respect of something prescribed in Division 1 item 5A, 8 or 9 of Schedule 3.1 to that Act.
16. Clearing that is done by a local government under the *Local Government Act 1995* section 3.26 if the person who is given a notice mentioned in item 15 fails to comply with it.

[Schedule 6 inserted: No. 54 of 2003 s. 116; amended: No. 38 of 2005 s. 15; No. 25 of 2009 s. 20; No. 22 of 2012 s. 123; No. 24 of 2016 s. 314(5).]

Schedule 7 — Appeals Convenor

[s. 107A]

[Heading inserted: No. 54 of 2003 s. 104.]

1. Term of office

Subject to clause 3, the Appeals Convenor holds office for a term, not exceeding 5 years, fixed by the instrument of appointment, and is eligible for reappointment.

[Clause 1 inserted: No. 54 of 2003 s. 104.]

2. Salary and entitlements

(1) The Appeals Convenor —

- (a) is to be paid salary and allowances at a rate per year determined by the Minister on the recommendation of the Public Sector Commissioner; and
- (b) has the same annual leave, sick leave and long service leave entitlements as a permanent officer of the Public Service.

(2) Subclause (1)(a) has effect subject to the *Salaries and Allowances Act 1975* if that Act applies to the Appeals Convenor.

[Clause 2 inserted: No. 54 of 2003 s. 104; amended: No. 39 of 2010 s. 89.]

3. Resignation and removal from office

(1) The Appeals Convenor may resign office by written notice delivered to the Governor.

(2) The Governor may remove the Appeals Convenor from office —

- (a) for —
 - (i) misbehaviour or incompetence; or
 - (ii) mental or physical incapacity, other than temporary illness, impairing the performance of the Appeals Convenor's functions;

or

- 1 (b) if the Appeals Convenor is, according to the *Interpretation*
2 *Act 1984* section 13D, a bankrupt or a person whose affairs
3 are under insolvency laws.
- 4 (3) In subclause (2)(a) —
5 ***misbehaviour*** includes behaving in a manner that renders the Appeals
6 Convenor unfit to hold office even if the conduct does not relate to
7 any function of the office of Appeals Convenor.
8 *[Clause 3 inserted: No. 54 of 2003 s. 104; amended: No. 18 of 2009*
9 *s. 35.]*
- 10 **4. Appointment of public service officer**
- 11 (1) A person who held office in the Public Service (***previous office***)
12 immediately before being appointed as Appeals Convenor —
13 (a) retains existing and accruing superannuation and leave
14 entitlements as if service as the Appeals Convenor were a
15 continuation of service in the previous office; and
16 (b) if he or she ceases to hold office as the Appeals Convenor on
17 the completion of a periodical appointment, is entitled to be
18 appointed to an office in the Public Service not lower in
19 classification and salary than the previous office (as long as
20 he or she is at that time eligible to hold such an office in the
21 Public Service).
- 22 (2) A person appointed to an office in the Public Service under
23 subclause (1)(b) retains existing and accruing superannuation and
24 leave entitlements as if service in the Public Service were a
25 continuation of service as the Appeals Convenor.
26 *[Clause 4 inserted: No. 54 of 2003 s. 104.]*
- 27 **5. Other conditions of service**
- 28 The Governor may, on the recommendation of the Public Sector
29 Commissioner, determine any other terms and conditions of service to
30 apply to the Appeals Convenor.
31 *[Clause 5 inserted: No. 54 of 2003 s. 104; amended: No. 39 of 2010*
32 *s. 89.]*
33

Part 3 — Other Acts amended

4. *Bush Fires Act 1954* amended

(1) This section amends the *Bush Fires Act 1954*.

(2) In section 24C delete the definition of ***rubbish tip*** and insert:

rubbish tip means disposal premises as defined in the
Waste Avoidance and Resource Recovery Levy
Act 2007 section 3;

5. *Waste Avoidance and Resource Recovery Act 2007* amended

(1) This section amends the *Waste Avoidance and Resource Recovery Act 2007*.

(2) In section 74(a) delete “a licensee, or occupier” and insert:

the holder of a licence, or a person

6. *Waste Avoidance and Resource Recovery Levy Act 2007* amended

(1) This section amends the *Waste Avoidance and Resource Recovery Levy Act 2007*.

(2) In section 3 delete the definition of ***disposal premises***.

(3) In section 3 insert in alphabetical order:

disposal premises means premises at which a
licensable waste activity is carried out;

licensable waste activity means an activity —

(a) which involves receiving waste; and

(b) the carrying out of which is an offence under the EP Act section 53 unless authorised by a licence;

(4) Delete section 6 and insert:

6. Liability to pay levy

The holder of a licence in respect of a licensable waste activity, or in the case of a licensable waste activity in respect of which a licence is not in force, a person required under the EP Act to hold a licence in respect of the activity, is liable to pay the amount of any levy imposed in respect of waste received at the disposal premises at which the activity is carried out.

7. Wildlife Conservation Act 1950 amended

(1) This section amends the *Wildlife Conservation Act 1950*.

(2) In section 16(1a) delete “section 51C(a), (b) or (c) of the *Environmental Protection Act 1986*.” and insert:

the *Environmental Protection Act 1986* section 51C(a), (b), (c) or (d).