

### **EPA SUBMISSION TO THE PROPOSED *ENVIRONMENTAL PROTECTION ACT 1986* AMENDMENTS**

28 January 2020

#### **Preamble**

The Western Australian Environmental Protection Authority (EPA) has a statutory obligation to use its best endeavours to protect the environment and to prevent, control and abate pollution and environmental harm. In undertaking this obligation, the EPA has a role in providing sound, robust and transparent advice to the State Government on matters related to the state's environment.

The EPA welcomes the State Government's commitment to modernising the *Environmental Protection Act 1986* (EP Act) to streamline the assessment process and to promote best practice environmental protection and sustainable development, noting that the last major amendments to the EP Act were completed in 2003.

The Discussion Paper and Exposure Draft Bill include proposed amendments which the EPA is broadly supportive of, including:

- changes which allow for a referral to be amended or withdrawn (s.38AA, 38AB and s.38a(3)); the termination of assessments (s40A) and the revocation of implementation agreements or decisions (s.47A);
- clarifications regarding amendments to proposals during assessments (s.43A);
- clarity with regard to the scope of implementation conditions that may be imposed on an assessed proposal (Part IV, Division 2);
- improvements to the assessment of schemes under Part IV, Division 3;
- provisions enabling the creation of environmental protection covenants (Part VB);
- allowing for the use of modern technology to support EPA meetings and decision making (s.11 and s.14A); and
- addition of Part IXA Bilateral agreements with the Commonwealth, which clarifies the roles of the EPA where a bilateral agreement applies.

The EPA understands that, in addition to the above, further redrafting of Part IV is being completed that will provide clarity for proponents and stakeholders. Similarly, the EPA understands that gendered references to the "Chairman" and "Deputy Chairman" are being updated to more gender neutral terms, and are fully supportive of this.

Beyond these proposed changes, the EPA recommends that further exploration of amendments in the following areas will ensure that Western Australia remains a leader in environmental impact assessment (EIA):

- assessment of cumulative impacts;
- strategic assessments – expanded definition;
- mechanism(s) for regional environmental values statements;

- environmental protection policies (Part III);
- composition and procedures of the EPA (Part II); and
- environmental protection covenants.

Further consideration of these issues will:

- improve the effectiveness and timeliness of assessments;
- provide a statutory basis for better managing current and emerging issues through mechanisms that allow for improved assessment and management of cumulative impacts; and
- develop better mechanisms for proactive engagement and advice tailored to regional areas, improving clarity and communication between proponents and the EPA.

More broadly, the EPA also recommends that where appropriate, any changes to the EP Act should have due regard to better alignment with the Commonwealth *Environment Protection and Biodiversity and Conservation Act 1999* (EPBC Act).

The EPA recognises that many of the issues below are complex and require detailed analysis and understanding to design and implement appropriately. On that basis, the EPA welcomes the opportunity for further engagement on these issues.

## **Assessment of Cumulative Impacts**

There are numerous areas of Western Australia in which the cumulative impacts of development, combined with pressure from other activities and processes such as climate change, are causing significant impacts on the environment.

At present under the EP Act, the EIA process focuses on project-level assessments. As part of modernising legislation and showing continuing leadership in best practice EIA, consideration must be made to allow for a mechanism to address project-level impacts in their entirety on the receiving environment. This includes effectively assessing the holistic impacts of a project over time in conjunction with other projects, either past, present or future.

The vital importance of this issue has been recognised, and is reflected in the first pillar of the EPA's Strategic Plan 2019-2022: *Improving the assessment and management of cumulative impacts*.

One major way to address this problem would be to include explicit reference to cumulative impacts into the EP Act – this would significantly improve the EPA's ability to provide targeted advice in relation to the assessment and management of cumulative impacts. This is not without precedent - other jurisdictions, including Canada and the United States, include direct reference to cumulative impacts or effects as part of their environmental protection and impact assessment legislation.

The explicit inclusion of cumulative impacts in the EP Act would provide a robust legal foundation for the assessment, management and provision of advice pertaining to cumulative impacts, not only affecting EPA EIA processes but more broadly to environmental protection, enhancement and management objectives of the entire EP Act. A direct reference to cumulative impacts would also facilitate strategic and innovative approaches to addressing cumulative impacts, ensure proponents address cumulative impacts explicitly, and would also minimise the risk of legal challenge over cumulative impact issues. This last point is particularly relevant as past legal challenges under the EPBC Act have highlighted gaps in explicit recognition of cumulative impacts in legislation as part of key legal decision-making process.

The EPA therefore recommends that Section 3 of the EP Act is amended to include a definition of cumulative impacts. This definition should include consideration of the successive, incremental and combined impacts of one or more activities on the environment, arising from past, present and reasonably foreseeable future actions.

As above, it is acknowledged that this is a complex issue, and there is currently considerable work being undertaken to help deliver against the EPA's strategic plan in this area. The EPA would welcome the opportunity for this work to be delivered collaboratively alongside the legislative amendment process.

Consistent with the EPBC Act and international best practice, there are two types of mechanism that can support the assessment and management of cumulative impacts; strategic assessment, and a process that is termed bioregional planning under the EPBC Act but which might be more appropriately termed 'regional environmental value statements' (or REVS) in Western Australia. Strategic assessment is a mainly reactive process conducted on a draft proposal. In contrast, REVS would be more proactive, aiming to provide a framework for the future environmental assessment and management of a region. The Hawke Review of the EPBC Act in 2009 (Hawke, 2009) strongly recommended increased use of both of these mechanisms to improve environmental outcomes, particularly with respect to managing cumulative impacts. Each of these mechanisms is discussed in more detail below.

### ***Strategic Assessment***

Strategic (environmental) assessments offer significant opportunity to contextualise and streamline environmental assessments. In international impact assessment practice, strategic assessments are defined as including the assessment of policies, plans and programmes.

At present the EPA is able to assess 'strategic proposals' defined in S37B(2) of the EP Act as follows:

*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; or*  
*(b) future proposals likely, if implemented in combination with each other, to have a significant effect on the environment.*

It is acknowledged in the discussion paper that this definition is convoluted and confusing and hence the "... draft Bill modernises the EP act to expressly define strategic assessments and to improve the definition of strategic proposals by using terminology consistent with that used in other jurisdictions, including the EPBC Act. These amendments will provide clarity and align the EPA's ability to conduct strategic assessments with similar processes in other jurisdictions". The EPA endorses this objective but suggests that the proposed amendments may not be sufficient to achieve the intended outcome.

Specifically, the EPA recommends that the definition of strategic assessment should be expanded beyond "the strategic assessment of strategic proposals". Currently, there is an inherent requirement that the strategic proposal must identify future significant proposals. This constrains the EPA's ability to undertake higher level strategic assessments. Instead, the EPA considers that there would be considerable value in conducting strategic assessments of policies and plans that may not have immediate and direct impacts on the environment (and which would therefore not meet the definition of a strategic proposal) but which may establish a policy direction that confers significant environmental benefits in the long term. There may also be value in requiring the owner of a policy or plan that has undergone strategic assessment by the EPA to demonstrate that due regard has been given to the outcomes of that assessment.

Further, and with regard to alignment with Commonwealth legislation, the EPBC Act addresses strategic assessments as a separate element, which the EPA notes provides improved clarity and should be considered as part of EP Act amendments.

Providing this clarity and incorporating an expanded definition of strategic assessments could be expected to improve environmental protection and management outcomes through:

- providing broader scope for strategic advice;
- better alignment with provisions under the EPBC Act and improved delivery of any future bilateral agreements;
- mechanisms to improve high level consideration of cumulative impacts; and
- improved coordination between EPA and strategic assessment proponents.

For example, a proposed process for the Strategic Assessment for the Perth and Peel Regions under the EPBC Act would allow all developments located within the relevant boundaries of the strategic assessment to be 'verified' rather than 'assessed' as would be the case with the process for derived proposals. The process to 'verify' a development may include just confirming that the location of the development is within the appropriate boundary and determining which approval conditions apply. Whereas the process to determine whether a development should or should not be declared a derived proposal requires more of an 'assessment' approach, which includes determining whether anything has changed (i.e. all environmental issues were assessed, whether new or additional information justifying reassessment, or whether there has been a significant change in environmental factors) and whether the proposal could be implemented subject to conditions and procedures.

In summary, the EPA recommends that amendments to the EP Act include a broader definition of strategic assessment such that policies, plans and programmes that are not 'strategic proposals' can also be assessed, with appropriate mechanisms to ensure due consideration is given to the outcomes of these assessments. Furthermore, the EPA recommends that it should have the ability to determine the appropriate process for a strategic assessment on a case-by-case basis similar to that allowed under the EPBC Act, including the ability to decide whether derived proposals under EP Act s.39B(4) are required. This would result in greater alignment of State and Commonwealth legislation, and would assist in further streamlining of the strategic assessment process.

### ***Regional environmental value statements (REVS)***

The EPA considers that modernisation of the EP Act should include provisions for the development of regional environmental value statements (REVS) that allow proponents of significant projects to proactively identify regionally important elements such as environmental values, assets, and threatening processes, and develop appropriate strategies for their management at a regional level. Like strategic assessments, the development and application of REVS could further streamline the assessment process by (for example) facilitating the granting of lower levels of assessment for future projects that have demonstrated clear alignment with the relevant REVS.

To facilitate greater alignment with Commonwealth legislation, REVS could be modelled on bioregional planning currently enabled under the EPBC Act. The 2009 Hawke Review of the EPBC Act suggested that such plans "provide a mechanism for identifying the biodiversity, heritage, social and economic values of a particular area, the management objectives and priorities in relation to those values, and strategies and actions for achieving those objectives" (Hawke, 2009, p165). Notwithstanding that the EPA is restricted in its consideration of social and economic values, this description could provide the basis for a suitable definition of a REVS being included in the updated EP Act. Such a definition might allow for the environmental values of a particular area, the management objectives and priorities in relation to those values, and strategies and actions for achieving those objectives to be identified during the assessment process.

The EPA considers that any new provisions for developing and applying REVS should be at the discretion of the Minister.

### **Environmental Protection Policies (Part III)**

It is noted in the discussion paper that no changes are proposed to Part III of the EP Act at this time. The EPA understands the contention that if time and resources are limited, updating Part III is not a priority at this time. We do, however, consider that

minor changes are required to modernise publication requirements (for example s.26(1)(d)) so that they are consistent with other sections of the EP Act.

## **Composition and Procedures of the Environmental Protection Authority (Part II)**

The EPA has strong reservations concerning the proposal to remove s.7(4b) in order to allow for the duties of the Chairman to be undertaken on either a full-time or part-time basis (s.7(4c)). The EPA does not consider that the Chairman's role and duties, which include statutory and time-bound obligations under Part IV, can be undertaken on a part-time basis or through job-sharing arrangements. The EPA considers that this proposed change would constrain the ability of the EPA to achieve its objectives as stated in the Act, and foresees that a part-time Chair may give rise to increased conflicts of interest in instances where a part-time Chair might hold other positions.

Under this Part, the EPA also notes and welcomes the proposed addition of s.14A, allowing for the Authority to make a decision by meeting remotely. The EPA considers this proposed change aligns with the modern operation and governance of boards.

## **Environmental Protection Covenants**

The EPA welcomes the addition of Part VB, however notes that s.86I, as currently drafted only allows for environmental protection covenants to be applied "if it is a condition of a clearing permit, or of an implementation agreement or decision in respect of a proposal". The EPA considers that this section should also allow for the application of environmental protection covenants under a statement of conditions for a scheme under s.48F.

## **Ongoing engagement by the EPA**

The EPA acknowledges that this submission encompasses a number of issues, which require further consideration and resources. The EPA would welcome the opportunity to work with the Department of Water and Environmental Regulation to further expand upon how these propositions might be incorporated into a modernised EP Act.

## **Reference**

Hawke, A. (2009) Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Interim Report. Department of the Environment, Water, Heritage and the Arts.