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Department of Water and Environmental Regulation

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Modernising the *Environmental Protection Act*: Discussion paper October 2019

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1. Introduction – pages 2-5

There are some words repeatedly used that are of concern: *streamline, approvals process, flexibility, balance*. These words imply a lack of scientific rigor and transparency in assessment of developments. ‘*Approvals process*’ implies that all proposals will be approved. The term *assessment process* should always be used.

It is the **protection of the environment** which is the primary role of the EP Act. Rigorous environmental protection ***must come first and be superior*** in assessments and decision-making. The Government must not let industry drive the changes to the legislation and its processes.

1.1 Background

The existing powers are supported.

Environmental protection policies (EPP) are a good feature but to date have not been used enough. See further comments under 2.5.

1.2 Policy drivers

The directions for reform are generally supported, although it is the specific detail of these that matters (see later comments under number **2 Key areas**).

For the public sector to do its job better, it needs **substantial additional resources** for more staff and environmental expertise in fields of botany, biology, ecology, air quality, hydrology and water quality, greenhouse gas emissions and carbon sequestration.

The meaning of the words ‘*improving the consistency and flexibility of legislative settings ...to deliver more efficient services to business*’ is unclear, but implies that fast approvals may be given rather than rigorous assessments and proper enforceable protection of the environment.

Proposed amendments to ‘**streamline**’ various processes has wide connotations which could imply fast **approval** rather than rigorous assessment or fast refusal. The word ‘*approval*’ when applied to the process should be replaced by the word ‘*assessment*’.

1.3 Why the legislation needs to be reformed

In the list of four reviews since 2006, three include the word ‘**approvals**’ in their names and description. The interests of industry groups have dominated. Only the Native Vegetation Review Committee’s description did not include these biased words.

1.4 How were the proposed amendments developed?

Again key industry stakeholders head the list of those consulted.

2. Key areas of reform in the *Environmental Protection Act 1986*

2.1 New areas of environmental reform

Bilateral agreements with the Commonwealth: The claim stated that Bilateral agreements maintain high environmental standards is not correct. Standards are not high enough, and too often in assessments Matters of National Environmental Significance (MNES) are not protected under the EPBC Act. It is recommended that separate assessments by the State EPA be maintained.

The proposed amendments are expected to have a positive benefit to business, consumers and the economy **but not to the environment, and thus at the expense of the environment**. This is unacceptable.

Environmental Protection Covenants

Introduction of Environmental Protection Covenants is supported only on the condition that they are legally binding and are **not 'more flexible'** than those under other legislation. They should be in perpetuity, not subject to amendment, and must be enforceable.

Environmental monitoring programs

Supported - on the condition that all monitoring is done by the State Government and is scientifically rigorous, comprehensive, and done independently of industries. Additional staff resources are needed for this work.

Provide a head power for certified environmental practitioners

Supported. Much needed.

Injunction to apply to a broader range of matters

Supported.

2.3 Part 1 – Preliminary

The purpose of the Act as in the long title is good and is supported.

2.4 Part II – Environmental Protection Authority

The advisory functions listed in section 16 are good and are supported.

EPA Chairman to be either full-time or part-time

The amendment to allow the Chairman to be part time is not supported. The Chairman should be full-time. All other members should be either part-time or full-time.

2.5 Part III – Environmental Protection Policies

Existing provisions for environmental protection policies (EPP's) to have the force of law are strongly supported and must remain. In addition the following is recommended:

Protecting key Environmental Protection Policies (EPPs)

Section 33 of the EP Act be amended to require public input into the EPA's advice to the Minister on the revocation of any existing Environmental Protection Policy (EPP). Parliamentary approval should also be required to validate the Minister's decision as in the case for any new EPP.

Notably the provisions of Part III of the Act for EPP's have been under-used. If used much more, it would make governance easier and more effective and 'efficient'. This is strongly recommended.

Examples:

1. Re-introduce the former **Wetlands EPP**.
2. Introduce an EPP for protection of all **Regional Parks**, including those recommended for declaration and introduction. For example the Peel Regional Park. Another example: Vlamingh Parklands was the outcome for a call for a Regional Park.
3. Introduce an EPP for the protection of the **Banksia Woodlands of the Swan Coastal Plain** Threatened Ecological Community with provisions which fully implement the '**Priority research and conservation actions**' in the Conservation Advice approved 26 August 2016 under the EPBC Act. The comprehensive, clear, and explicit wording is already provided on pages 33- 43 of this Conservation Advice and should be used verbatim in an EPP. Part is:

"PROTECT the ecological community to prevent its further loss of extent and condition; RESTORE the ecological community within its original range by active abatement of threats, re-vegetation and other conservation initiatives: COMMUNICATE WITH AND SUPPORT researchers, land use planners, landholders, land managers, community members, including the Indigenous community, and others to increase understanding of the value and function of the ecological community and encourage their efforts in its protection and recovery."

In the list of actions under PROTECT, it states:

Preventing vegetation clearance and direct habitat damage

"Prevent further clearance, fragmentation or detrimental modification of remnants of the ecological community and of surrounding native vegetation, for example, during residential development, basic raw materials extraction, and associated infrastructure development.

Overall, efforts should be made to increase the remaining extent, condition and landscape scale connectivity (including with other surrounding native vegetation types).

4. Introduce an EPP for the **critically endangered Tuart Forests and Woodlands of the Swan Coastal Plain** in the same way as for the Banksia Woodlands TEC in 3 above. This can provide for legal enforcement by the State Government of the federal Approved Conservation Advice for the Tuart communities.

2.6 Part IV – Environmental Impact Assessment

Assessment of proposals

Proposed changes supported.

Implementation decisions for proposals

It is essential that implementation decisions where a proposal is environmentally unacceptable is not permitted to proceed. The Minister should not be able to approve a proposal 'having regard to other matters' but where it is environmentally assessed as unacceptable, or where an appeal is upheld on the basis of the unacceptable impact or risk to a significant environmental factor.

Thus the section 45 process must uphold the advice of the EPA so that the environmental matters are protected. The proposed changes appear to weaken the provisions of the EP Act to **protect the environment. This is unacceptable. Environmental protection must be the over-riding power made explicit in the Act.**

Surrender or Revocation of Implementation Agreement

Supported.

Changed proposals and revised proposals

The proposed amendment to section 45C to enable the Minister to require information when a proponent makes a request to change the proposal – is supported, with the addition that the EPA or the CEO also be enabled to require this information.

2.7 Part V – Environmental Regulation (pages 16-21 of Discussion paper)

Clarifying when decisions on applications for clearing permits or licences are constrained

The proposed amendment is supported.

Clearing of Native Vegetation

The current provisions and their enforcement to properly regulate clearing are **a significant failure**. Major changes are needed to retain and protect native vegetation.

There is a major failure to prevent clearing in areas that are subject of and at variance to any one of the 10 Clearing Principles. All clearing which is at variance to one or more Clearing Principles should not be granted Clearing Permits. The legislation needs to be strengthened so that this is mandatory and is enforced.

The ~40 exemptions are unacceptable. There are too many and they require review. There should not be any exemptions for the Wheatbelt and the south west biodiversity hotspot, especially on the Swan Coastal Plain. This can be applied by declaring these areas as *environmentally sensitive areas (ESA's)* under the EP Act.

All areas of threatened ecological communities (listed by both by State and Commonwealth) should be declared *environmentally sensitive areas* under the EP Act.

Similarly all areas of natural habitat of rare species of flora and fauna should also be declared *environmentally sensitive areas* under the EP Act.

As stated, **exemptions do not apply in '*environmentally sensitive areas*'**. But the past and current administration of clearing permits for '*environmentally sensitive areas*' is not preventing clearing in these areas and there are many cases of unauthorised (ie illegal) clearing which are not being prosecuted. For example, this is the case for roadside clearing in the Wheatbelt, an area seriously over-cleared and in which no further clearing should be permitted on any lands.

The wording of the Clearing Principles in Schedule 5 could be changed so that under the Clearing Regulations, no clearing is permitted if it is at variance to one or more of the Clearing Principles.

Currently Schedule 5 reads in part:

Schedule 5: Clearing Principles

Native vegetation should not be cleared if —

- (a) it comprises a high level of biological diversity; or
- (b) it comprises the whole or a part of, or is necessary for the maintenance of, a significant habitat for fauna indigenous to Western Australia; or
- (c) it includes, or is necessary for the continued existence of, rare flora; or
- (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.

This provision could be turned around as follows (changes highlighted):

Native vegetation should **only** be cleared if —

- (a) it comprises a **low** level of biological diversity; or
- (b) it **does not comprise** the whole or a part of, **and** is **not** necessary for the maintenance of, a significant habitat for fauna indigenous to Western Australia; or
- (c) it **does not include**, **and** is **not** necessary for the continued existence of, rare flora; or
- (d) it **does not comprise** the whole or a part of, **and** is **not** necessary for the maintenance of, a threatened ecological community; or
- (e) it is **not** a remnant of native vegetation in an area that has been extensively cleared; or
- (f) it is **not** growing in, **and is not** in association with, an environment associated with a watercourse or wetland; or
- (g) the clearing of the vegetation is **not** likely to cause appreciable land degradation; or
- (h) the clearing of the vegetation is **not** likely to have an impact on the environmental values of any adjacent or nearby conservation area; or
- (i) the clearing of the vegetation is **not** likely to cause deterioration in the quality of surface or underground water; or
- (j) the clearing of the vegetation is **not** likely to cause, or exacerbate, the incidence or intensity of flooding.

This would mean that under the EP Act clearing will not be permitted in the over-cleared Wheatbelt, nor on the Swan Coastal Plain, nor in the south west global biodiversity hotspot.

Also, so-called trivial clearing would not be permitted in these regions.

2.13 Schedule 5 (page 26 of Discussion paper)

Definition of ‘threatened ecological community’

The proposed change is strongly supported.

3 Further issues for consideration (page 27 of Discussion paper)

We recommend that the following 10 amendments be made:

1. Validating the objects and principles of the EP Act

The **object of the EP Act** be extended in scope to explicitly include two additional matters:

- **A requirement for Greenhouse gas emissions and climate change to be considered throughout the administration of the Act;** and

- A new provision to be added to the Act requiring the EPA and DWER to ensure that all practicable measures are taken to **prevent the injury, pain, and distress of animals** whose well-being falls under areas currently subject to their consideration.
- 2. The EP Act be amended to require decisions made under Parts II, IV and V to give effect to the **object and principles** as contained in section 4A.
- 3. A new subsection be added to section 4A of the EP Act, which (a) obliges the EPA to prepare and publish its **policies** on environmental impact assessment and environmental protection in a manner consistent with the objects and principles of the Act, and (b) ensures that these published policies are **mandatory considerations**.
- 4. Section 7 of the EP Act is amended to prevent politicisation of the Board of the EPA. It is suggested that this should occur through the inclusion of a set of eligibility criteria for the appointment of Board members as a schedule to the Act. These criteria should be developed following public and professional consultation.
- 5. Section 44(3) be amended to make it clear that the government may not request or direct the EPA to alter the content any of its reports prior to publication.
- 6. Section 33 of the EP Act be amended to require public input into the EPA's advice to the Minister on the revocation of any existing EPP. Parliamentary approval should also be required to validate the Minister's decision as in the case of any new EPP.
- 7. Section 38A of the EP Act be amended to make it mandatory for the EPA to explicitly consider and report on the possible **cumulative impacts of every proposal** it receives.
- 8. The EP Act be amended so that the criteria for determining significance are contained in the body of the Act rather than within the separate administrative procedures.
- 9. We strongly recommend that the EPA's policies and guidelines be **amended to limit the use of offsets** and make explicit the circumstances under which they can be applied.
- 10. An amendment modelled on section 475 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) be adopted. The amendment would allow a person, or a person acting on behalf of an unincorporated organisation, to apply to the **Supreme Court** for an injunction if a proponent engages or proposes to engage in conduct that constitutes an offence or other contravention of the EP Act or the regulations and conditions made under it.
- 11. **We strongly recommend that WA establish a specialised environmental court or tribunal, or, alternatively, extend the powers and expertise of the State Administrative Tribunal (SAT) to deal with merits-based environmental decisions.**
- 12. We recommend that a new section 21A be added to the EP Act, to impose a duty on the EPA for regular **State of Environment (SoE) reporting**; to specify the required content of

SoE reports; and to ensure the regular tabling of reports in Parliament accompanied by a Ministerial response.

3.1 New ideas (page 27 in Discussion paper)

The three ideas listed are supported.

3.2 Delegations

Supported

3.3 Role of the Environmental Protection Authority

The first two dot points are supported.

The third dot point is not supported as culture and heritage are often closely linked to the environment, especially Aboriginal heritage.

3.4 Environmental Protection Policies

The three dot points are supported. See further relevant comments made above under 2.5 Part III

3.5 Assessment

All dot points are supported.

Cumulative impacts must be fully considered. See recommendation 7 above.

3.6 Decision-making

Points supported. The last dot point is very important.

3.7 offsets

Strongly supported. Once areas become TEC's, they must not be permitted to be cleared with the justification of an offset. Instead the 'avoid' principle must apply.

3.8 Clearing of native vegetation

Dot points supported, especially the third one. We emphasise that clearing must be legally stopped under provisions of the Act for highly cleared areas including the Wheatbelt, and the Swan Coastal Plain including Perth and Bunbury areas. This should apply to so-called trivial proposals. Landholders and infrastructure agencies such as Main Roads, Water Corporation, Public Transport Authority and Landcorp need to abide by these requirements.

Clearing Principles contained in Schedule 5 to the Act should be rewritten as positive duties; i.e. '*native vegetation should only be cleared if*' rather than the present '*native vegetation should not be cleared if*'. This is explained in detail above.

3.10 Compliance and enforcement

Strongly supported. Enforcement is currently under resourced and ineffective. This must be changed urgently so that the EPA and DWER are funded for increased government scientists to be employed to properly enforce ministerial conditions. This should include new resources for field inspections and scientific surveys by additional government botanists, biologists, ecologists, hydrologists for DWER and EPA.

3.11 Appeals

The current appeals process is flawed and outdated. The UBC has submitted many appeals to no avail when adequate assessment for environmental protection has not been carried out. **An environmental tribunal or court** as exists and functions in most other states to hear and assess

appeals - is urgently needed in WA. See also our recommendation 11 under Further Issues for consideration.

State of Environment reporting

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