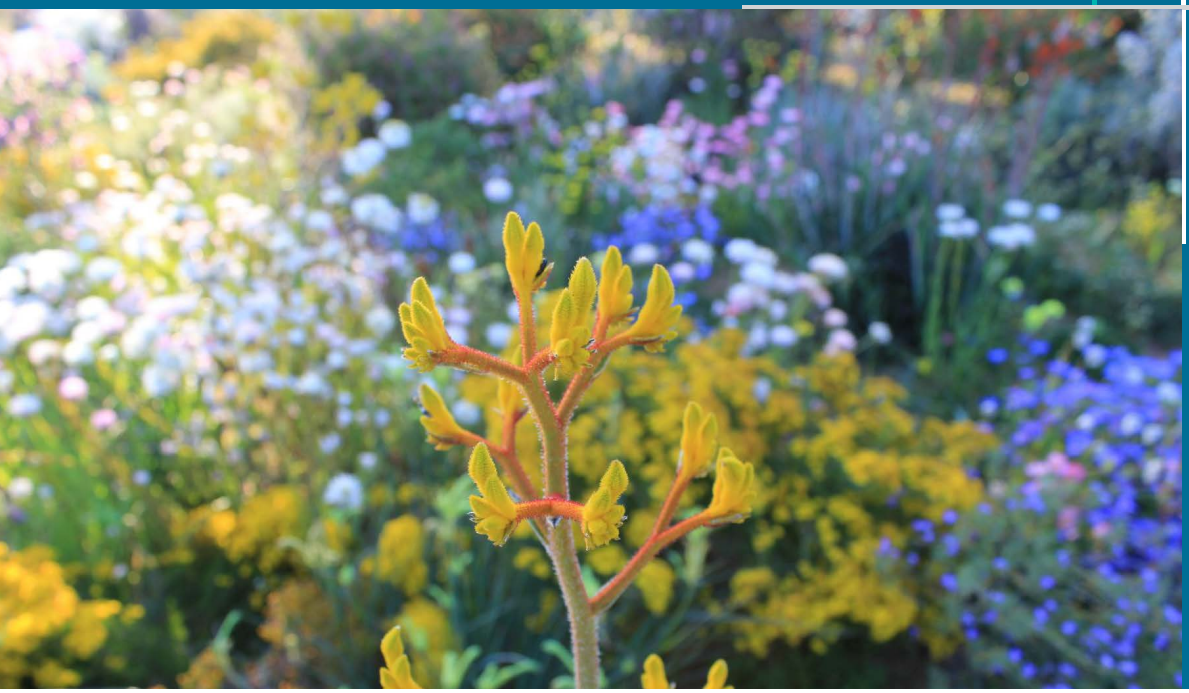
Government of **Western Australia**
Department of **Water and Environmental Regulation**

Modernising the *Environmental Protection Act*

Discussion paper

October 2019



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Department of Water and Environmental Regulation
October 2019

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Foreword

Western Australia is home to some of the world's most biologically diverse flora and fauna as well as some of the world's most significant natural resources. For this reason, finding a balance between delivering on the full economic potential of our resources and the protection of human health and the environment is vital.

It is essential that our precious environment is protected for current and future generations and that environmental legislation works efficiently to support a sustainable economy.

The Department of Water and Environmental Regulation was established to create a 'one stop shop' for industry and developers with the aim of streamlining and simplifying Western Australia's water and environmental regulation. This process is ongoing and the modernisation of the *Environmental Protection Act 1986* (EP Act) is integral to this work.

Modernising Western Australia's environmental protection legislation supports this objective and promotes best practice on environmental protection and sustainable development.

The amendments outlined in this discussion paper focus on environmental impact assessment, environmental regulation and clearing of native vegetation regulated under the EP Act. The proposed amendments are drawn from a number of reviews undertaken since the last major amendments by the Gallop Government in 2003 and from feedback from stakeholders over that same period.

The intent of this paper is to promote discussion, invite feedback and encourage stakeholder involvement to support the modernisation of the EP Act.

I encourage you to carefully consider the proposed changes to this critically important legislation and provide your comments during the submission period.

I am confident that after broad and open consultation the amendments will be brought to the Parliament and will lead to more effective environmental legislation and ensure sustainable development can occur for the benefit of all Western Australians.

Hon Stephen Dawson MLC

Minister for Environment

1 Introduction

The *Environmental Protection Act 1986* (EP Act) was introduced over 30 years ago, and has been effective in providing a framework for protecting the environment and ensuring that the impacts of significant proposals are assessed and managed.

It is now timely to ensure that the EP Act is prepared for future challenges and continues to meet the expectations of the community and industry in protecting the environment and promoting sustainable development.

1.1 Background

The Environmental Protection Authority (EPA) and the Department of Environmental Protection were both established by the *Environmental Protection Act 1971*. This was the first time that Western Australia had a specific department and independent authority with powers to:

- take positive action to control environmental degradation;
- establish environmental protection policies that set acceptable standards for present and for the future;
- invoke public opinion as and when necessary;
- provide avenues of appeal in appropriate cases.

These powers, along with the establishment of the EPA, remain the cornerstones of the current EP Act.

The 1986 EP Act repealed the 1971 EP Act, as well as a number of other statutes dealing with pollution control, and consolidated regulation of pollution in the new Act. A number of the provisions of the 1971 Act were not implemented, particularly the provisions allowing for the declaration of environmental protection policies and the control of waste. The 1986 Act was intended to address the legal impediments to these. The 1986 Act also formalised the need for and requirements of environmental impact assessment, and the role of the EPA and Minister in assessment and decision-making. The second reading speech noted the retention of the EPA's functions to oversee and coordinate investigations, and provide independent advice on the protection and conservation of the environment.

While there have been a number of amendments to the EP Act since 1986, major changes include:

- the separation and clarification of the roles of CEO and Chairman of the EPA in 1993;
- the introduction of procedures aimed at bringing together planning and environmental assessment at an early stage of the development process in 1996;
- the introduction of provisions relating to legal proceedings and penalties in 1998;
- the introduction of provisions to regulate the clearing of native vegetation in 2003 and to create the offence of material or serious environmental harm.

It is timely to review the legislation, taking into account a number of government reviews that have been conducted and feedback from Ministers and stakeholders on its operation.

An Exposure draft Bill has been prepared for discussion and to invite feedback. Additional issues are also outlined in this paper for broader consultation.

1.2 Policy drivers

The McGowan Government's Service Priority Review was established in 2017 to drive reform of service delivery, accountability and efficiency of the Western Australian public sector. The proposed amendments to the EP Act specifically address the Service Priority Review's four directions for reform. These include:

- building a public sector focused on community needs - putting issues of community priority at the forefront of everything the public sector does.
- enabling the public sector to do its job better - overhauling internal systems to allow the sector to carry out work more efficiently and in the public interest.
- reshaping and strengthening the public sector workforce - embedding better workforce practices to support a more agile and innovative sector.
- strengthening leadership across government - applying stewardship and continuous improvement to get the best performance out of agency heads and central agencies.

The amendments in the Exposure draft Bill will support these directions by:

- ensuring that community expectations for a healthy environment are promoted and achieved;
- driving reform of processes and approaches to the regulation of the environment to promote more efficient practices;
- modernising the EP Act, improving the consistency and flexibility of legislative settings, and enabling the Department of Water and Environmental Regulation (DWER) to deliver more efficient services to business;
- improving regulatory processes under Parts IV and V, thereby supporting investment, employment and business creation in the State and good environmental outcomes; and
- assisting budget repair by providing for cost recovery of environmental impact assessment and services provided by the State Government on behalf of the Commonwealth Government through bilateral agreements.

The proposed amendments:

- modernise and streamline processes for environmental impact assessment, clearing permits, works approvals and licences;
- improve regulatory effectiveness; update the EP Act to reflect and accommodate technological developments;
- facilitate the implementation of bilateral assessment and approval agreements under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), and address errors and inconsistencies.

1.3 Why the legislation needs to be reformed

The EP Act amendments outlined in this discussion paper address issues raised by a number of reviews since 2006.

Office of Development Approvals Coordination Working Group

The Office of Development Approvals Coordination established a working group, which included the Conservation Council of WA, WWF-Australia, Chamber of Minerals and Energy, Association of Mining and Exploration Companies, Australian Petroleum Production and Exploration Association, Department of Industry and Resources and Department of Environment and Conservation. The review proposed a number of principles for reform (with a focus on clearing provisions and the resources sector) and reported to the then Environment Minister in 2006.

Native Vegetation Clearing Review Committee

In July 2008, an expert committee chaired by Associate Professor Garry Middle, was established to review the native vegetation clearing provisions under the EP Act, which considered government outcomes for native vegetation protection, and suggested amendments to the EP Act, regulations and policies to improve the effectiveness and efficiency of clearing regulation. The committee reported to the Minister for Environment in April 2009.

Industry Working Group - review of approvals processes in Western Australia

An Industry Working Group chaired by Mr Peter Jones was established by the Minister for Mines and Petroleum in November 2008 to provide strategic advice on improving the credibility and efficiency of Western Australia's mining and petroleum approvals. It provided its final report to the Minister for Mines and Petroleum in April 2009.

Environmental Stakeholder Advisory Group on approvals process reform

An Environmental Stakeholder Advisory Group chaired by Dr Bernard Bowen was established in June 2009 to provide advice to the Minister for Environment on more efficient and coordinated assessment and decision-making for development approvals, with better environmental outcomes. The Advisory Group included representatives from industry, conservation and community groups, Murdoch University, and the Western Australian Local Government Association. The report was provided to the Minister in December 2009.

1.4 How were the proposed amendments developed?

The proposed amendments were developed after consideration of the outcomes of the reviews described above and internal reviews based on the outcome of appeals, court outcomes and advice that has been received by the DWER.

Key industry, conservation, government and community stakeholders were consulted as part of previous legislative reviews relating to environmental regulation, including the expert committee chaired by Associate Professor Garry Middle, the Environmental Stakeholder Advisory Group, and a Native Vegetation Government

Agency Working Group which considered legislative amendments proposed in submissions to the Middle Review.

Draft bilateral assessment and approval agreements under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) were released for public consultation in 2014. An assessment bilateral agreement commenced on 1 January 2015.

1.5 How to use this discussion paper

The paper is organised to focus on the key themes of the Bill, explaining the intent of the reforms and highlighting areas which consultation has shown to be of particular interest to stakeholders.

It generally follows the scheme of the EP Act and the Exposure draft Bill. The Exposure draft Bill is the version of the EP Act that would be in place if the amendments were passed by Parliament with amendments shown in track changes. This has been done to make it easier to understand the effect of the Bill on the EP Act.

The discussion paper does not include details of changes made in the Bill where these are minor corrections, improvements in wording or consequential amendments.

The discussion paper also discusses issues raised by stakeholders which require more open input and where drafting has not been completed. This is intended to allow for more open consideration of the policy issues for potential inclusions in the Bill to be considered by Parliament.

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

2.1 New areas of environmental reform

Bilateral Agreements with the Commonwealth (page 312)

Western Australia has a bilateral agreement with the Commonwealth of Australia to undertake bilateral assessments under the Commonwealth *Environment Protection and Biodiversity and Conservation Act 1999* (EPBC Act). The EPBC Act also provides for approvals bilateral agreements.

Bilateral agreements provide for an efficient, timely and effective process for environmental assessment and approval of the Commonwealth's controlled actions. They remove duplication of assessment and approval processes of the Commonwealth and WA while maintaining high environmental standards.

Amendments to the EP Act will ensure the State Government's ability to fully implement bilateral agreements, including providing that it is a function of not only the EPA, but also the Minister for Environment and the CEO of the Department, to promote the implementation of a bilateral agreement, or to take into account any guidelines or policies established under a bilateral agreement.

Amendments will ensure that the Minister for Environment and the CEO, in exercising their powers and functions in relation to the assessment of proposals and schemes, clearing permit applications and appeals, may exercise those powers and functions in a manner that is consistent with, and enables the implementation of bilateral agreements under the EPBC Act.

Amendments will also allow fees to be lawfully charged for work necessary for the purposes of discharging any additional obligations of the CEO as part of bilateral agreements in connection with clearing permit processes. It will also enable fees to be charged under Part IV of the EP Act for undertaking duties including processing referrals, undertaking assessments and approving management plans prepared as a condition of approval.

Overall, the amendments in relation to bilateral agreements are expected to have a positive benefit to business, consumers and the economy by removing duplication of Commonwealth and State Government environmental assessments and approvals.

Modernise requirements for advertising, publishing and confidentiality (various sections)

The EP Act currently imposes a variety of publication or advertising requirements in relation to different documents under various provisions of the Act.

To ensure consistency between the advertising and publishing requirements of the EP Act, uniform language is proposed when referring to advertising or publishing requirements (i.e. refer uniformly to a requirement to 'publish' rather than 'advertise' and the requirement to publish in a prescribed manner).

Consistent publishing requirements are also extended to a broader range of provisions under Part IV and V. These amendments are in line with modern publishing practices, reflecting changes in technology, and providing for the use of alternate means of publishing, such as the internet, and promoting accountability and transparency.

A provision is also proposed to allow regulations to prescribe further types of information and documents that must be published, or may be published on a case-by-case basis. This may include reports and information submitted for compliance purposes (e.g. under licence conditions, implementation statements and environmental protection covenants).

It is intended that a consistent approach to confidentiality, and exceptions to publication requirements, will be adopted throughout the EP Act. It is intended that the confidentiality test under section 39 in relation to Part IV proposals is removed and that criteria that will apply to the entire Act, and the process for making confidentiality claims, may be prescribed in regulations.

The Act may need to provide that the obligation to publish particular documents, material or information is subject to any exception prescribed in the regulations. The regulations will prescribe a process for making a request that information is not to be published, how such a request is dealt with, and any criteria to be adopted in determining whether an exception from the general publication requirements should apply.

Prescribed copyright requirements are also to be applied to any documents submitted under the Act, to ensure that information can be published without infringement of copyright.

This amendment promotes transparency and accountability and also aligns with the Western Australian Whole of Government Open Data Policy. It will also ensure that publication of documents can be done in an efficient manner reducing administrative burden.

Environmental Protection Covenants (page 223)

Currently, a condition can be imposed on a clearing permit requiring the permit holder to give a conservation covenant or agreement to reserve under the *Soil and Land Conservation Act 1945* or some other binding undertaking to establish and maintain vegetation.

There are issues with the enforceability and scope of those covenants, agreements and undertakings because the CEO has no control over whether a covenant or agreement is entered into. Further, a conservation covenant under either the *Soil and Land Conservation Act 1945* or the *Biodiversity Conservation Act 2016* must be consistent with those Acts, the objects of which relate to soil conservation and biodiversity conservation respectively, rather than the broader environmental objects of the EP Act.

The Bill includes a new part, which provides for environmental protection covenants. 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, which will be enforceable under the Act. These covenants will be more flexible than those available under other legislation, may be either in perpetuity or for a specified

period, may contain positive or negative obligations, and may be amended. They will also be open to appeal consistent with current conditions set through the EP Act.

Environmental monitoring programs (page 292)

Amendments are proposed to the EP Act to enable cost recovery from industry for key state environmental monitoring programs that assess cumulative industry impacts on health and the environment.

Two examples of such programs are the transfer of responsibility for the Port Hedland Industries Council's air quality monitoring network for the monitoring of dust levels to DWER and implementation of the proposed Murujuga Rock Art Monitoring Program including the atmospheric deposition monitoring and ambient air quality monitoring network.

The Bill will introduce head powers for implementing environmental monitoring programs (EMPs) in consultation with relevant industry and community stakeholders to address cumulative impacts from industry. The cost-recovery framework will require specified licence holders to contribute to the costs of the EMP consistent with the principle of "polluter pays" under section 4A of the EP Act.

A new agency special purpose account (Environmental Monitoring Fund) will be established for industry financial contributions with the funds to be used only for the purposes of an EMP.

Provide a head power for certified environmental practitioners (page 341)

The quality and content of documentation submitted for assessment under the EP Act can be highly variable. Accreditation of environmental practitioners to certify documents prior to their submission has the potential to save time and resources for both government and industry, improve the quality of documentation provided and therefore the accuracy of predictions and management responses and therefore the timeliness of approvals.

The amendments will enable recognition of accreditation in line with work of the Heads of Environmental Protection Agencies Australia and New Zealand National Certification of Practitioners Working Group, which was established to improve the level of assurance in the quality, reliability and accountability of environmental reports and documentation provided to government.

Recognition of an accreditation and certification scheme will support the environmental consulting industry by setting minimum standards for environmental practitioners, ensuring that scientifically robust documentation is submitted to support

decision-making under the EP Act (including referrals and applications, scoping and assessment).

Injunction to apply to a broader range of matters (page 267)

The CEO does not have an express power to apply for an injunction from the Supreme Court to restrain breaches of the offences in Part IV and Part V. This power currently only applies in respect of clearing offences under section 51S.

The Bill allows the CEO to apply for a statutory injunction to restrain breaches in a wider range of circumstances than available via common law injunctions.

2.2 Improvements to administrative efficiency

A number of provisions create unnecessary delays and inflexibility in the administration of the EP Act.

For example, it is currently not possible to amend the purpose of a clearing permit. It is also necessary to give notice of an amendment to a permit or licence where the amendment is made to give effect to a Minister's appeal decision and must be implemented. The voluntary surrender of a licence or permit is treated the same way administratively as a revocation for breach.

Minor amendments to address a range of administrative inflexibility and inefficiencies have been made in the Bill.

2.3 Part I – Preliminary

The purpose of the EP Act as outlined in the long title is

> "to provide for an Environmental Protection Authority, for the prevention, control and abatement of pollution and environmental harm, for the conservation, preservation, protection and enhancement and management of the environment and for matters incidental with the foregoing."

The object of the EP Act is to "protect the environment of the State", having regard to a number of environmental principles, the first four of which come from the Intergovernmental Agreement on the Environment. According to the second reading speech for the Environmental Protection Amendment Bill 2002, these are not principles of sustainable development, a concept that involves economic and social considerations beyond the scope of the EP Act.

The second reading speech goes on to clarify that it would be reasonably expected that these principles might be given specific consideration in the development of policies, strategies and broad regulations.

Amendments in Part I are to definitions that are a consequence of amendments to other Parts of the EP Act and therefore are not discussed in this section.

2.4 Part II - Environmental Protection Authority

Part II of the EP Act establishes the EPA as an agent of the state with various advisory functions listed in section 16, including:

- to conduct environmental impact assessments;
- to advise the Minister on environmental matters;
- to prepare, and seek approval for, environmental protection policies;
- to promote environmental awareness within the community and to encourage understanding by the community of the environment.

It also sets out the composition of the EPA members and procedures for holding meetings.

EPA Chairman to be either full-time or part-time (page 26)

The EP Act currently provides that the duties of Chairman must be performed on a full-time basis. The amendments allow all members to be appointed on a part-time or full-time basis as determined by the Minister on recommendation of the Governor.

Use of modern technology to support EPA meetings (page 29)

The EP Act does not provide for EPA meetings to be facilitated using technology such as teleconference or video conference, nor allow resolutions to be passed without a meeting. Proposed amendments allow meetings of the EPA to be conducted using technology, and resolutions to be passed without a meeting if assented to by all members in writing. This is consistent with more contemporary legislation such as the *Waste Avoidance and Resource Recovery Act 2007*.

2.5 Part III – Environmental Protection Policies

Part III sets out the process and requirements for developing environmental protection policies, including the role of the EPA in drafting and consulting on these, and the Minister's role in approval. Once approved by the Minister, environmental protection policies are laid before Parliament and have the force of law.

An approved policy may set out the basis on which the portion of the environment to which it relates is to be protected; or 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.

There are currently four environmental protection policies in force: Western Swamp Tortoise Habitat, Goldfields Residential Areas Sulfur Dioxide, Kwinana (Atmospheric Wastes) and the Peel Inlet – Harvey Estuary.

Some stakeholders have suggested various changes to Part III. As experience has shown that environmental protection policies have mixed effectiveness, it is proposed that before considering such amendments, there be a review of the effectiveness of this Part, including opportunities for improved practices and recommendations for change.

No changes are proposed at this time.

2.6 Part IV - Environmental Impact Assessment

Part IV of the EP Act provides for the EPA to assess the environmental impacts of proposals and planning schemes, which are likely, if implemented, to have a significant effect on the environment.

The EPA, in considering referrals of significant proposals made under section 38 of the EP Act or schemes referred under section 48A, may decide to assess the proposal or scheme.

Following the assessment, it may make recommendations to the Minister for Environment as to the setting of conditions and procedures to be imposed under section 45. Alternatively, the EPA may decide not to assess a proposal and in doing so provide advice to other decision makers, including the CEO of DWER.

The Bill has a number of provisions to streamline and improve regulatory efficiency of the environment impact assessment process.

Referral of proposals (page 52)

The EP Act does not expressly allow for a referred proposal to be withdrawn where a proponent does not wish to proceed. Given the operation of section 38(5j), there is a risk that a proposal once withdrawn (or partially withdrawn) cannot be referred again. While the termination of an assessment under section 40A allows the proposal to be referred again, this currently only applies after a decision has been made to assess the proposal. The Exposure draft Bill allows the EPA to declare a referral to be withdrawn if no response is received within the specified period from the proponent, or if the proposal was referred by a person other than the proponent, with the agreement of the proponent.

Significant proposals may be referred to the EPA by third parties without sufficient information about the proposal. It is intended to give the proponent the ability to amend a proposal after referral to better define the proposal prior to a decision being made about whether it should be assessed. The proponent will also have a separate ability to have a proposal withdrawn where it notifies the EPA that it does not wish to proceed with the proposal.

In deciding whether to assess a proposal, the scope of that assessment and providing recommendations to the Minister, the Bill provides that the EPA may take into account the role of other statutory decision-making authorities in regulating the environmental impacts of that proposal. The intent is to ensure that the EPA can decide not to assess a proposal, or a particular impact of a proposal, where the impact on a key environmental factor can be adequately regulated under other parts of the Environmental Protection Act or other written laws. This amendment reduces duplication of assessments and approvals.

Assessment of proposals (page 58)

The Exposure draft Bill clarifies that the Minister may direct the EPA to assess or further assess a proposal after the EPA has decided not to assess the proposal and the Minister, having determined a section 101(1)(a) appeal, has upheld the EPA decision. The Minister will have the power to direct the EPA to assess or re-assess a proposal more fully or more publicly (based on new information, or failure to consider

something in the initial decision), even after the EPA's decision not to assess the proposal is upheld on appeal.

It is proposed to amend section 39A so that the EPA has discretion to determine which decision-making authorities it will notify of its decision to assess a proposal (and are therefore constrained from making a decision which allows its implementation). The intention of this amendment is to allow the EPA to identify only the major decision-makers in relation to an approval rather than being required to give notice to every government body which must grant an approval connected to the proposal, no matter how minor and unconnected with the proposal's environmental impacts.

Strategic assessments (page 62)

It is widely recognised that strategic approaches, rather than case by case assessments, can lead to more efficient planning of projects and better environmental outcomes. Provisions in the EP Act allow for the assessment of 'strategic proposals' by the EPA. Under these provisions, assessment of 'strategic proposals' may give rise to more streamlined consideration of future 'derived proposals' that fall within the parameters of the strategic proposal. Using this approach to assessment allows the EPA to consider cumulative environmental impacts on a sub-regional and regional basis, rather than on a proposal by-proposal basis.

Examples of strategic proposals are a plan for the development of an industrial precinct, a program of aquaculture development by multiple proponents in a defined zone, a structure plan for urban development of land, and a plan for extensive infrastructure over a wide area.

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.

Implementation decisions for proposals (page 74)

Once the EPA has provided its assessment report to the Minister, the Minister must determine any appeals received in objection to the content and recommendations in the EPA's report. Having determined the appeals, under section 45, the Minister is to then consult with other decision-making authorities and reach agreement on whether the proposal should be implemented, and what conditions should be applied.

If an appeal is lodged in respect to the EPA's report, the proposal cannot be implemented and the conditions and procedures not agreed or decided under that section, otherwise than in accordance with the appeal decision. The Minister's appeal decision relates only to environmental matters.

In Conservation Council of WA (Inc) v the Hon Stephen Dawson MLC [2018) WASC 34, the Supreme Court found section 45(6) merely requires the Minister and decision-making authorities to take into account the contents of the EPA's report and recommendations, as amended through the appeal process, during its section 45

consultation and agreement process. However, the section 45 process allows a range of matters to be considered, and therefore the final outcome may differ from the recommendations of the EPA, which are based only on environmental matters.

The Exposure draft Bill addresses the judgment, and clarifies that the Minister's appeal decision does not constrain the outcome of the decision-making process under section 45(1). This is done by amending the current subsection 45(6)(a)(ii) to require the Minister and other decision-making authorities to have regard to the outcome of an appeal in making an agreement under section 45.

The Exposure draft Bill also amends section 45 so that the Minister for Environment is only required to consult and attempt to reach agreement with those decision-makers relevant to the proposal and its environmental impacts. The intention is to only include those decision-makers who have a significant role in regulating a proposal and the aspects of the proposal likely to have significant environmental impacts, rather than minor, routine approvals.

The Exposure draft Bill clarifies that the Minister may transfer responsibility for a proposal after a statement that records the implementation agreement or decision has been published.

Surrender or Revocation of Implementation Agreement (page 86)

It is also proposed to provide that if a proposal is not substantially commenced by the commencement date specified in the implementation agreement or decision, then the Minister may revoke the implementation agreement.

One of the shortcomings of the current EP Act is that once the Minister approves a proposal, there is no provision to withdraw or suspend the approval if, for example, the proponent decides not to proceed with the proposal or the proposal is complete.

The Exposure draft Bill includes amendments allowing an implementation agreement or decision to be revoked or expire:

(a) where it is granted for a finite period, at the end of that period;
(b) where a condition provides that substantial commencement must occur before a specified date and this does not occur;
(c) in any other case, with the agreement of the proponent

Conditions (page 744)

To provide greater clarity and certainty regarding the types of implementation conditions that may be imposed, a provision similar to section 51I and 62A of the EP Act is proposed to specify the types of implementation conditions that may be imposed. These include the power to enter into covenants and impose offsets, including making monetary contributions to a fund for counterbalancing the impacts of the implemented proposal. The list is not exhaustive and does not limit the types of conditions that the Minister may impose.

Changes to conditions can be made after an implementation statement has been given to a proponent. Other than minor changes, the Act currently does not allow the Minister to change conditions until the EPA has undertaken an inquiry.

The Exposure draft Bill expands the scope of the minor changes that the Minister may make to conditions without an EPA inquiry. In particular, the Minister may make changes at the request of the proponent if the Minister considers that the implementation of the proposal under the amended conditions will not have a significant detrimental effect on the environment in addition to, or different from, the effect of the proposal under the existing conditions. This is equivalent to the test that is currently used in section 45C for changes to proposals and ensures that conditions remain current and effective. This criteria will also be applied in the case of revised proposals to determine the changes to existing conditions that can be made without a section 46 inquiry when issuing a new combined Ministerial Statement.

Where changes to conditions are subject to an inquiry by the EPA before a decision is made, the Minister must currently consult with all decision-making authorities that were consulted on the original decision about whether to implement the proposal. This is the case regardless of whether the change is relevant to that decision-making authority. The Bill provides that the Minister need only consult with relevant decision-making authorities whose functions are affected by the changes to the conditions.

There is also an express power to impose conditions allowing for staged implementation of a proposal, so that different conditions may apply to different stages of the proposal, and conditions may prevent subsequent stages of a proposal being commenced until the CEO is satisfied that any specified preconditions have been met.

Changed proposals and revised proposals (page 71)

Under the current section 45C, the Minister may approve of a proponent's change to a proposal after a statement has been issued, without the need for the proposal to be referred to the EPA. The approval of a change under this section, without EPA assessment, must not occur if the Minister considers that the changes to the proposal might have a significant detrimental effect on the environment, in addition to, or different from, the effect of the original proposal.

The Minister's determination under section 45C depends upon the proponent supplying accurate information. The consequences of such Ministerial decisions can be very significant.

Under section 112, it is an offence to provide information in compliance with a requirement under the EP Act which is false or misleading. However, section 45C does not include any capacity for the EPA or the CEO to require information, and therefore section 112 does not apply.

To address this issue, the Exposure draft Bill proposes amendments to section 45C to enable the Minister to require information when a proponent makes a request to change the proposal.

Sections 43A and 45C in the EP Act currently allow minor changes to be made to a proposal during assessment (section 43A) and after a Ministerial Statement has been given (section 45C) without a 'revised proposal' being referred. It is proposed to 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 the proposed amendment would justify setting a different level of

assessment, require further information from the proponent, or further public review.
The EP Act does not define the term 'revised proposal' or expressly provide for the referral and assessment of a revised proposal.

The Exposure draft Bill inserts a provision which clarifies the 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.

Compliance and enforcement (page 85)

The 2003 amendments to the Act introduced an offence for implementing a proposal that the Minister has decided may not be implemented. The seriousness of this offence and potential for serious environmental harm is not adequately reflected by the current penalty. The maximum penalties are amended to be consistent with monetary penalties for intentionally causing serious environmental harm.

Currently the Minister may only stop the implementation of a proposal for a period not exceeding 24 hours where the Minister is not satisfied with any relevant monitoring conducted or on receiving a report from the CEO or a decision-making authority that an implementation condition is not being complied with. The Exposure draft Bill provides for the Minister to issue a notice requiring implementation of a proposal to cease for up to 28 days.

Under section 47(2), if an implementation statement has been served under section 45(5), the proponent is to give the CEO reports and information about the implementation of the proposal as are required by written notice. To clarify the extent of this power, the Bill allows the CEO to require the proponent to undertake such work and provide such information, as is necessary to determine whether the implementation conditions relating to the proposal are being complied with.

Section 48(2) of the EP Act provides that if implementation conditions are included to meet the requirements of another decision-making authority, then that decision-maker may monitor that implementation to determine if the implementation conditions are being complied with. Section 48(2a) then provides that the decision-maker may exercise any power available to it under written law, where there is non-compliance with the implementation conditions.

There are circumstances where it would be appropriate for a public authority that is not a decision-making authority to monitor compliance with proposal implementation conditions. The Exposure draft Bill 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.

Schemes (page 91)

Under section 48A(1) of the EP Act, when a scheme is referred to the EPA, the EPA must decide whether or not to assess the scheme, or determine that it is incapable of being made environmentally acceptable. It must then inform the responsible authority (and the Minister for Environment in the latter case) within 28 days after the referral.

There is no provision for the EPA to extend this time in the event that it has insufficient information in which to make a decision. The Bill allows for an extension where the EPA has sought additional information about a scheme to enable it to make a decision consistent to the capacity that exists in respect of proposals.

The EP Act does not currently provide for an agreement or decision that a scheme may not be implemented. Under section 48F of the EP Act, the agreement sought between the Minister for Environment and the responsible Minister (Minister for Planning) is in respect to the conditions. The decision as to whether the scheme may be implemented is for the Minister for Planning.

The Bill brings the assessment of planning schemes in line with those that already exist for assessment of proposals. The EPA's assessment report in respect to a scheme must set out the Authority's recommendations as to whether or not the scheme may be implemented and, if it recommends that the scheme may be implemented, the conditions, if any, to which the scheme should be subject; and the Minister for Environment and Minister for Planning can reach agreement that a scheme may not be implemented.

If the Minister for Environment and Minister for Planning reach agreement under the EP Act that a scheme may not be implemented, then that scheme cannot be approved under the *Planning and Development Act 2005*.

Cost recovery (page 91)

Cost recovery does not currently apply for environmental impact assessment under Part IV of the EP Act.

A head power has been included to allow a fee, charge or levy to be imposed on the proponent for Part IV environmental impact assessment to enable cost recovery. Regulations will be developed in consultation with stakeholders and having regard to cost modelling being undertaken.

This amendment is in accordance with State Government policy for cost recovery and the need to reflect a fair and reasonable true cost of services.

The levy funds will be paid into a special purpose account which must be used for the purposes of the administration of Part IV of the EP Act only.

2.7 Part V – Environmental Regulation

Clarifying when decisions on applications for clearing permits or licences are constrained (page 120 and page 151)

Constraints on the CEO's decision-making apply where an application for a clearing permit or licence is related to a proposal which has been referred to the EPA under section 38, and for which a decision-making authority is precluded (by section 41) from making a decision that could cause or allow the proposal to be implemented.

To avoid doubt, promote better definition of significant proposals, and ensure that Ministerial and decision-making authority consultation under section 45(1) is not fettered, an amendment is proposed to clarify that the CEO may not make a decision on a clearing permit or licence application which have the effect of

leading the proposal down the road of implementation in potential contradiction of the advice of the EPA or the decision of the Minister.

For example, if infrastructure such as a port or railway would not exist in the absence of a mining operation, a decision on an application for this infrastructure prior to the Minister's implementation decision on the mining operation would be constrained.

Clearing of Native Vegetation (page 111)

The provisions to regulate clearing of native vegetation were inserted into the EP Act in 2003, and have been operating since 8 July 2004.

Under the EP Act, clearing of native vegetation is an offence unless a permit is held or the clearing is exempt. Exemptions for clearing authorised under written laws are set out in Schedule 6 of the EP Act, while exemptions for routine land management practices are set out in the Environmental Protection (Clearing of Native Vegetation) Regulations 2004. The exemptions in regulations do not apply in environmentally sensitive areas set out in a notice made by the Minister for Environment.

The principal criticism that has been levelled at the clearing provisions is their complexity, and that they are focused on process rather than outcomes. This view is at the heart of many stakeholder submissions made during previous reviews.

The Bill simplifies and improves the provisions for clearing of native vegetation by focusing on environmental outcomes rather than administrative processes.

Declaration of Environmentally Sensitive Areas - section 51B (page 112)

The Minister for Environment declares by notice either a specified area of the state, or a class of areas of the state, to be an environmentally sensitive area (ESA). Consultation requirements are set out in this section. Exemptions to the requirement to hold a clearing permit prescribed under the Environmental Protection (Clearing of Native Vegetation) Regulations 2004 do not apply within ESAs (s51C(c)). The ESA Notice remains in force until it is repealed by the Minister. The ESA notice is therefore fixed in time and needs to be re-gazetted if any updates are required.

The Minister is required to follow the requirements of section 51B each time the ESA Notice requires updating regardless of whether the only change is to update the ESA so that it adopts the most recent listings made under other legislation.

It is proposed to address this issue by prescribing ESAs in regulations so that the consultation requirements can be tailored to the nature of the change, rather than needing to follow a prescriptive approach. This will ensure ESAs remain current and relevant, and there is an efficient and effective process for prescribing ESAs. Regulations remain subject to scrutiny by Parliament, which will ensure the development of ESAs is a transparent process.

Referral process for clearing permits (page 115)

Section 51C of the EP Act requires that all clearing of native vegetation must be authorised by a clearing permit or be subject to an exemption. This results in an

administratively burdensome process for trivial clearing for which an exemption does not apply but which may not have a significant effect on the environment.

A new referral system requires that any clearing not exempt under the Act is to be referred to the CEO for a determination of whether a clearing permit is required, having regard to specified criteria set out in the Act - the size of the area, known or likely environmental values, scientific knowledge and whether conditions are likely to be required to manage environmental impacts. The adoption of this referral-based system will have the effect of ensuring that resources and assessments focus on significant clearing.

The new referral system will provide a robust method to determine whether the clearing should be subject to a permit against the specified criteria, with the decision of the CEO being published. This will prevent the system being tied up in an administrative process that does not result in clear environmental benefits.

For clearing where a permit is required, the clearing provisions, including assessment against the clearing principles in Schedule 5 of the EP Act, would continue to apply.

Use of satellite imagery - section 51R (page 134)

DWER's vegetation monitoring program uses aerial photography and satellite imagery. While aerial photography is used in the prosecution of clearing offences, satellite imagery forms the foundation of the monitoring program, due to its cost-effectiveness and ability to cover a large area of land.

Section 51R of the EP Act provides an averment for aerial photography, but not for satellite imagery. However, while the court may accept satellite images, an expert witness is required to prove that the image is what it purports to be and that it can be relied upon. This is a resource intensive process. A new section provides for the use of 'remotely sensed images' as prima facie evidence.

Licences (page 140)

The Bill substantially replaces the existing Part V Division 3 of the EP Act. Many of the changes modernise and simplify the provisions without changing the intent. For that reason, the issues paper focuses on the key substantive changes.

The current approach regulates works and emissions on prescribed premises as defined in Schedule 1 of the Environmental Protection Regulations 1987 (EP Regulations). There is a poor relationship between environmental risk and regulatory capture. The approach has led to the need for additional regulations to cover situations not dealt with by the EP Act, as well as creating requirements which do not represent any significant environmental risk. It has also led to unnecessary technical breaches of legislation as the provisions are complex and clumsy.

The current Part V Division 3 creates a system under which an occupier is not expressly required to hold a licence. This has resulted in ambiguity about what a licence authorises.

It also raises questions such as whether a licence authorises an activity of a different category to those listed in the licence or any activity that falls within the

category listed; the consequences for carrying out additional activities where these are not included in the licence; and whether these authorised emissions are restricted to those arising from the activities that make the premises a prescribed premises, or every potential emission.

The Exposure draft Bill provides significantly more flexibility and certainty in the regulation of activities and emissions that pose a risk to the environment.

Regulation of prescribed activities (page 140 and page 142)

The Bill addresses these issues firstly by requiring the regulation of prescribed activities rather than prescribed premises. Consequential amendments to the prescribed premises categories in Schedule 1 of the EP Regulations will prescribe both an activity and a threshold level. If met, this will trigger a requirement to hold a licence, which is supported by a new offence of carrying out a prescribed activity without a licence. Under the Bill, a licence will only authorise, or provide a defence for, emissions that are expressly regulated by the licence.

The move from premises-based to activity-based licensing will address the legal uncertainty around the appropriate boundary for a prescribed premises. The ability to define a licence area will remain, but with flexibility to determine the appropriate area over which a licence and its conditions may extend in each case. For example, in some cases, the licence area may only cover the area on which the activities are conducted, even though the cadastral boundary is much larger. This change will also allow licences to overlap where, for example, one physical area is shared by two different operators carrying out separate and independent operations.

The provision for licences to no longer necessarily be connected to a premises also makes it possible to grant a licence to a person other than the occupier of the land. It is not always legally or factually clear who the occupier of a premises is for example where facilities are shared by a number of operators or where there are complex legal agreements in place giving various parties rights to access and use an area.

Where a number of parties are involved in carrying out a business conducting a prescribed activity, the Bill gives the business some flexibility in nominating who should hold the necessary licence by providing that ’any person‘ carrying out a prescribed activity may apply for and hold a licence. This will greatly improve the effectiveness of the licensing regime by allowing a licence to be granted to the person with day to day control and the ability to take measures to comply with the licence, whether or not that person is the legal ‘occupier’.

Voluntary licences (page 141)

The Bill increases flexibility by allowing a person who carries out an activity that does not meet the threshold for a prescribed activity to apply for and hold a licence. The creation of an opt-in system will provide protection for smaller operators that wish to hold a licence to avail themselves of the defences against offences of pollution or serious or material environmental harm.

Liability of persons other than the licensee (page 157)

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. This is intended to ensure that responsibility for a breach of condition lies with the most

appropriate person, having regard to the level of oversight and responsibility held by the licensee.

Controlled works regulated within licence (page 141-142)

The Bill also improves the regulation of controlled works by combining works approvals and licences into one instrument that can authorise and regulate controlled works and activities. This will simplify and streamline processes and reduce administrative burden for both the regulator and licensee.

Ambiguity in the current Act is addressed by clarifying when approval is required to carry out controlled works, and by enabling such works to be added to a licence by way of amendment, rather than requiring a new approval. It also ensures that the design and operation of a prescribed activity is integrated.

Decisions (page 145)

The Bill improves transparency and accountability by clearly setting out the factors to which the CEO must have regard in determining whether to grant or refuse an application. This includes a new requirement for the CEO to have regard to planning instruments in considering applications in relation to licences, which is consistent with clearing permit provisions and will provide for consistency between the environmental and planning systems.

Revocation or suspension (page 148)

The Bill also provides additional flexibility by allowing suspension or revocation of a licence for non-payment of prescribed fees. Currently, non-payment of a licence fee results in automatic termination of the licence and the administrative burden of a new licence being required without the discretion to suspend.

An ability to give a closure notice where the licence is suspended is included, which may be used to avoid the need for a revocation by allowing requirements to be imposed while the licence is suspended to provide for improvements to be made while investigations take place.

In addition to the requirement for the CEO to have regard to planning instruments and development approval, the grounds under which the CEO can revoke a licence include that a planning approval required to carry out the authorised works or prescribed activity is no longer in force.

Vegetation Conservation Notices (page 188)

To improve regulatory effectiveness and transparency, amendments allow the CEO to impose additional specified measures in a vegetation conservation notice, specifically monitoring, record keeping and reporting. This is to ensure the CEO receives information on the specified measures required to be taken by the recipient of the vegetation conservation notice from that recipient, and can assess compliance of those specified measures.

The definition of wetland in section 70(4)(b)(iv) is inconsistent with the definition of 'wetland' in Schedule 5 of the EP Act. This is as a result of amendments made as part of the debate on the 2003 Amendment Act. The definition in section 70(4)(b)(iv) should have been consequently amended at the time of the Bill to be

consistent with that in Schedule 5. The proposed amendment to the definition of wetland rectifies this oversight.

Defences (page 199)

Clearing (page 198)

There is currently no defence for clearing to prevent danger to human health (e.g. removing a damaged tree that is close to a campsite), where the clearing takes place in an ESA.

An exemption for clearing to prevent imminent danger is currently available under item 2, regulation 5 of the Clearing Regulations. However, this exemption does not apply to clearing that takes place in ESAs.

It is considered that there should be a defence for clearing in an environmentally sensitive area to prevent danger. It is intended that section 74 defences will apply to offences under section 51C, which will be consistent with the approach used for environmental harm and pollution offences.

Defence offered by a licence (page 202)

The Bill narrows the scope of the defence offered by a licence to an offence involving pollution, an emission, or the discharging or abandoning of waste where the licence has expressly authorised the emission or waste, and any limits on that emission or discharge imposed by the conditions of the licence have been complied with.

2.8 Part VI - Enforcement

Entry to premises (page 235)

Section 89 provides inspectors with the power to enter premises for specified purposes, including determining whether there has been compliance with, or contravention of, any requirement under the EP Act. However, difficulties are encountered where premises are locked, as DWER authorised officers do not have the power to enter locked premises, even in the presence of a police officer.

The Exposure draft Bill includes a power for inspectors to use reasonable force, similar to section 110 of the *Swan and Canning Rivers Management Act 2006*, to enforce the EP Act where there are reasonable grounds to suspect non-compliance. 'Reasonable force' could only be used against property, and not against persons and where the use of force is likely to result in significant damage, CEO consent is required before such force is used.

Powers to enter to determine whether an offence is being committed (page 234)

While section 89 provides general powers of entry to a premise for an inspector to determine whether an offence is being, or is likely to be committed, it does not provide any power to remove samples for the same purpose. The Bill empowers inspectors to seize anything that the inspector suspects on reasonable grounds is involved in an offence against the Act, or is evidence of such an offence.

Power to require production of books and other sources of information (page 236)

Section 90(1)(b) provides an inspector with the power to require persons to produce books or other sources of information relating to an emission, or to the manufacture, sale or distribution for sale of prescribed equipment or material.

It does not extend to information relating to environmental harm, clearing of native vegetation, or other potential breaches of the Act which do not involve an emission. The Bill corrects this oversight.

Power to compel to attend to answer questions (page 236)

The power to require persons to answer questions under section 90(1b)(b) does not include a power to compel the person to attend a particular time and place. This has resulted in persons of interest avoiding compulsory questioning by non-attendance. The Bill allows an investigator to require a person to attend at a specified time and place to answer questions where the investigator has reasonable grounds to believe that the person has information relevant to the matter being investigated. Similar powers exist in section 21 of the *Mines Safety and Inspection Act 1994* and section 54 of the *Petroleum Pipelines Act 1969.*

Electronic statements (page 238)

Presently, witnesses who are compelled to answer questions under section 90(1b)(b) of the EP Act may refuse to be recorded electronically. Manual recording of compulsory interviews can take more than 10 times longer than electronic recordings, and such interviews are more likely to be challenged as being inaccurate.

Difficulties are also experienced in verifying statutory declarations in rural and remote areas where the closest Justice of the Peace may be located thousands of kilometres away. The use of electronically recorded statements would avoid the need for a statutory declaration in such circumstances.

The use of electronic recordings of statements is considered to be best practice and the Bill would allow an inspector to record an interview by electronic means. Such an amendment would increase efficiency in enforcing the EP Act and would improve the reliability and accuracy of the interview process.

Averment for appointment of an inspector

In a court case for the offence of obstruction, the State Solicitor's Office was required to prove that an inspector was validly appointed under section 88 of the EP Act. This necessitated several witnesses and numerous documents. An averment is included in the Bill for inspectors similar to that in section 41 of the *Evidence Act 1906* for customs officers.

Recovery of costs for inactivating audible alarms (page 248)

Section 99 of the EP Act provides police officers with the power to enter premises to inactivate an audible alarm which has been sounding for a prescribed period of time and is emitting unreasonable noise. DWER is responsible for paying any fee charged by an assistant (e.g. a technician) and must pass this cost to the owner of the premises.

The cost incurred by DWER in administering this debt recovery process often outweighs the cost of disabling an alarm. The number of alarms which require disabling is also decreasing over time as old alarms are replaced with alarms which meet the current Australian Standards.

The Bill deletes section 99(4) to remove DWER's power to recover the cost of disabling an audible alarm from the owner of the premises.

2.9 Part VIA- Legal Proceedings and Penalties

Modified penalties - Part VIA Division 1 (page 249)

The modified penalty system under Part VIA, Division 1 of the EP Act is currently available for some Tier 2 offences, but not to any Tier 1 offences. In many circumstances, Tier 1 offences which do not include an element of criminal negligence or intentional conduct, would be more efficiently dealt with under the modified penalty system than through a criminal prosecution.

Expansion of the existing modified penalty system to include specified non-intentional Tier 1 offences would improve the flexibility and efficiency of enforcement. The modified penalty system would apply to all Tier 2 offences and non-intentional Tier 1 offences.

The alleged offender would still be able to elect whether to accept or reject a modified penalty notice, as is currently the case under the modified penalty system, or refuse a modified penalty and opt for criminal prosecution.

Consideration of criteria for modified penalties - section 99A (page 249)

Section 99A(1) sets out the criteria which must be met before a modified penalty can apply. The Bill includes an additional criterion in section 99A(1), which requires the CEO to consider the potential, or actual, environmental impact of any conduct giving rise to the alleged offence.

Currently, the CEO may only issue a modified penalty notice if each and every factor in section 99A(1) is met. In many cases, a modified penalty may still be considered appropriate, even where some criteria have not been met.

This inflexibility may be resolved by amending the EP Act so that the CEO must consider each of the criteria listed in sections 99A(1)(c) - (f), rather than requiring each criterion has been met. Each of these considerations would need to be documented in the certificate issued under section 99A(2)(a).

Timeframe for issue of infringement notices - section 99J (page 256)

Section 99J of the EP Act provides an inspector or police officer with 35 days (from the date an alleged offence is believed to have been committed) in which it may issue an infringement notice.

Unlike other criminal offences, DWER is not always alerted to the commission of an offence under the EP Act within a short period of the offence occurring. In addition, the nature of environmental offences also often requires investigation before sufficient evidence is available to identify the alleged offender.

An amendment to section 99J to allow the 35 day time limit to run from the date that the offence first comes to the attention of an inspector, or police officer in

relevant circumstances, would address the difficulties currently being encountered in identifying the offender within the current timeframe and would be consistent with section 114A.

Profits - section 99Z (page 265)

Section 99Z of the EP Act provides the court with the power to order an offender to pay an additional penalty not exceeding the court's estimation of any monetary benefits which the offender has or will acquire as a result of the commission of an offence. "Monetary benefits" do not include any profits which the offender has made as a result of committing the offence.

There have been a number of cases where the offender has made a substantial profit as a result of committing an offence of unauthorised clearing. This profit is often higher than the penalty imposed for the commission of the offence under the Act. This is inconsistent with the principle that a person should not profit from unlawful conduct.

The Bill amends the definition of "monetary benefits" under section 99Z(2) to include any profits which would not have been accrued had the offender not committed the offence.

2.10 Part VII – Appeals

Allowing appeals to be lodged with the Appeals Convenor (page 282)

Currently under the EP Act, an appeal is required to be lodged with the Minister. In practice, almost all appeals are received by the Appeals Convenor. Part 7 of the EP Act is to be amended to enable appeals to be lodged with the Appeals Convenor to improve administrative efficiency.

Where a change to implementation condition is subject to appeal, implementation may continue (page 272)

When implementation conditions are changed following an inquiry by the EPA under section 46 of the EP Act, the proponent may lodge an appeal under section 100(3). Under section 101(3)(c), the lodging of an appeal under section 100(3) prevents the implementation, or continued implementation, of the proposal.

The Bill removes this provision as it generally serves no purpose, where it has already been agreed that a proposal may be implemented. Any environmental risk can be addressed by providing that the implementation conditions, as changed, will apply while the appeal decision is pending.

Appeals Convenor not required to report where committee appointed (page 280)

The Appeals Convenor is required to report to the Minister on all appeals unless the appeal is against a decision of the Minister. Section 106(2) provides that the Minister may, at his discretion, appoint a committee to investigate any appeal, and the committee is then required to report to the Minister. The Bill clarifies that the Appeals Convenor is not required to report to the Minister where a committee has been appointed under section 106(2) and will report to the Minister.

Minister's decision on appeal (page 281)

Section 107(2) states that the Minister may determine an appeal after receiving a report from the EPA or CEO under section 107(1), and the Minister's decision will be final and without appeal.

The provision allows the Minister to make a final decision on appeal without receiving or considering a report from the Appeals Convenor or appeal committee. It is also contrary to section 109(3)(a) that the Minister can determine an appeal against a Ministerial decision otherwise than in accordance with a committee report. This provision appears to be an artefact of an earlier version of the Act, prior to the establishment of the Appeals Convenor and the Bill deletes it.

Appeals committee to consider submissions received by the Minister from a decision- making authority for the proposal (page 280)

This provision requires the Appeals Convenor to consider submissions received by the Minister from a decision-making authority for the proposal where that decision-making authority is not an appellant. The provision appears not to require an appeals committee appointed under subsection 106(2) to follow the same approach. The provision is to be amended to ensure consistent processes in both cases.

2.11 Part VIII – General

Institution of proceedings for offences prescribed under regulations (page 302)

Section 114 of the EP Act sets out who may institute proceedings for Tier 1, 2 and 3 offences. There is no provision for instituting proceedings for offences prescribed in regulations made under the EP Act. This has resulted in considerable uncertainty in determining who can institute proceedings for offences under regulations.

The Bill resolves this issue by amending section 114(1b) so that it applies to Tier 3 offences and offences prescribed for the purposes of the EP Act.

2.12 Schedule 1)

Penalties (page 333)

Section 47(4)

Under section 47(4) of the EP Act, it is an offence for a proponent to implement a proposal if the Minister has notified the proponent that the proposal may not be implemented. The penalty for this offence is the same as the offence under section 47(1) for not complying with proposal implementation conditions that is $125,000 for an individual and $250,000 for a body corporate.

The penalty for an offence under section 47(4) has remained the same since the provision was introduced in 2003. The penalty for an offence under section 47(4) is to be increased to $500,000 for an individual and $1,000,000 for a body corporate.

Section 112

The penalty for providing false and misleading information under section 112 is to be increased from $50,000 to $100,000.

2.13 Schedule 5

Definition of 'threatened ecological community' (page 355)

The *Biodiversity Conservation Act 2016* consequently amended the EP Act to restrict this definition to threatened ecological communities listed under that Act. This has had the unintended consequence of removing the communities listed under the EPBC Act, despite the operation of the bilateral agreement. The Bill rectifies this omission.

2.14 Schedule 6

Exemption for clearing that is a requirement under another written law (page 357)

Clause 1 of Schedule 6 of the EP Act provides an exemption for clearing that is done as a requirement of another written law. There is uncertainty regarding the intent of this exemption and the extent to which it applies to local laws.

The current uncertainty is addressed by amending clause 1 so that it refers instead to clearing that is done to give effect to a requirement to clear under a prescribed written law, and specifically listing the legislation to which the exemption applies in a new Schedule to the EP Regulations 1987. Schedule 6 also includes new items for known requirements under written laws.

3 Further issues for consideration

A number of proposals for changes to the EP Act have been raised since 2003 by stakeholders, Ministers and decision-making authorities, which have been previously considered, but not progressed. Further consideration and feedback is sought on these proposals to determine if they will support the modernisation of the EP Act.

These suggestions have been organised by theme. As the State Government is keen to have open feedback, no analysis of these proposals, or views as to their merit, are presented. It is noted that these suggestions may provide different, often conflicting, recommendations. For this reason, drafting has not yet occurred as the State Government wishes to have the benefit of wider consultation on possible reform directions.

Where appropriate, these will be incorporated into the final Bill for consideration through Parliament.

3.1 New ideas

- Include new provisions under the EP Act to ban certain products or product classes.
- Resources provided for third party and community participation in environmental impact assessment and environmental regulation.
- 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.

3.2 Delegations

- Clearly control any delegation of decision-making to non-environmental agencies or officers, to ensue these powers are exercised to protect the environment

3.3 Role of the Environmental Protection Authority

- Require 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.
- Part 2 should include eligibility criteria for the appointment of EPA Board members as a schedule to the Act, which is developed following public and professional consultation.
- Remove duplication issues between the EP Act and the *Heritage Act 2018*. The EPA is not the best entity to assess heritage or culture.

3.4 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.
- Parliamentary approval should also be required to validate the Minister's decision as in the case for any new environmental protection policy.
- Revise Part III to facilitate the broader adoption of environmental protection policies.

3.5 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.
- 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.
- 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.
- 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.
- 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.
- 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.
- Broader powers for strategic assessments to allow cumulative impacts to be more fully considered and regionally important environmental values protected.

3.6 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.
- Include statutory criteria for decision-makers to have regard to when making decisions under the EP Act.
- Require all decision-makers under the Act to provide written reasons where requested.

- Add statutory criteria for recommendations by the EPA as to whether a proposal may be implemented.
- 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.
- 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
- 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.
- 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.
- Clarify how the time limit for implementation of a proposal works.
- 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.
- Clarification in respect to derived proposals, including that they are subject to a Ministerial Statement.
- Clarify revised proposal provisions, including constraints to decision-making and implementation.
- 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.
- 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.

3.7 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.

3.8 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).
- 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.
- 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.
- Areas of reform should include exemptions, principles and definitions applying to clearing.

3.9 Industry regulation

- Include a power to license mobile plant and equipment.

3.10 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.
- 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.
- The funding arrangements for the EPA be reviewed to ensure that the auditing and compliance is able to be carried out effectively.

3.11 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.
- 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.

4 Having your say

4.1 How to provide feedback

The Department of Water and Environmental Regulation is seeking your input on both proposed amendments as set out in the discussion paper and Exposure draft Bill, as well as feedback on the proposals raised by stakeholders. In addition, there may be other issues that you would like to see addressed.

Your feedback will help inform the final Environmental Protection Amendment Bill for the consideration of Parliament.

You are invited to share your views by making a submission to the Department of Water and Environmental Regulation.

To make your submission as effective as possible, you are asked to provide your feedback against the relevant section of the Exposure draft Bill or discussion paper. If you are raising an issue outside of the scope of the Bill or discussion paper, please make this clear. Submissions can be made online.

You can also send hardcopy submissions to: EP Act Discussion Paper, Department of Water and Environmental Regulation Locked Bag 10, Joondalup DC WA 6919

4.2 Your legal rights and responsibilities

If you make a submission, please be aware that in doing so, you are consenting to it being treated as a part of a public document. Your name will be published; however, your contact address will be withheld for privacy. If you do not consent to your submission being treated as part of a public document, you should either mark it as confidential, or specifically identify what information you consider to be confidential, and include an explanation. Please note that even if your submission is treated as confidential by the department, it may still be disclosed in accordance with the requirements of the *Freedom of Information Act 1992*, or any other applicable written law. DWER reserves the right before publishing a submission to delete any content that could be regarded as racially vilifying, derogatory or defamatory to an individual or an organisation.

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