The Conservation Council of WA

Preliminary submission for the Productivity Commission inquiry into the Impacts of Native Vegetation and Biodiversity Regulations

The issues the subject of this inquiry are broad-ranging and of great significance to Australia's future. We regret that we have been unable to complete our final submission to the inquiry in time for the scheduled Perth hearing of the Commission.

We therefore forward this preliminary submission in time for the said hearing, and we aim to provide a comprehensive submission in late August.

Terms of reference

- It is fairly clear from the terms of reference (ToR) that the political impetus for this inquiry comes from the assumption that native vegetation and biodiversity regulations adversely impact on landholders – the only question for the Commission appears to be the extent to which that is the case.

- The limitations of the ToR also create the potential for the inquiry to miss the point about biodiversity regulations in particular – they are not designed solely for "reducing the costs of resource degradation" (ToR 3(b)), but also to achieve other objectives such as:

    1. meeting Australia's international commitments arising from the Convention on Biological Diversity;

    2. meeting the targets in the National Strategy for the Conservation of Australia's Biological Diversity;

    3. preserving icon areas and species that provide the basis for much of Australia's tourist industry; and

    4. attempting to guarantee the long-term survival of all species because they are no less entitled to inhabit the Earth than we are.

- We are also particularly concerned about ToR 3(d) – why is the inquiry only looking for "perverse environmental outcomes" (which we understand to mean regulations designed for environmental protection that have actually caused environmental harm in some way)? We would suggest that a much more interesting topic is the extent to which non-environmental regulations and subsidies have created or sustained industries whose net economic benefit to the

community is marginal but whose environmental impact is massive – "perverse economic outcomes", one might say.

Issues paper

- The potential for bias evident in the ToR seems to have been borne out by the Issues Paper (IP). Section 1.1 notes, in part:

> "Concerns have been raised about the effectiveness of new regimes in meeting environmental objectives, and the possible negative impacts of the regulations on farming and other practices, property values and returns and the investment behaviour of landholders." (see page 5 of the IP)

Who have raised these concerns? Do those groups or individuals have a conflict of interest – that is, do their concerns potentially relate more to the extent to which regulations impact on their businesses than the extent to which regulations have been effective in meeting environmental regulations?

We would instead ask the Commission to focus on the possible negative impacts of <u>not</u> having the current regulations, or, in WA's case, of not introducing new native vegetation and biodiversity regulations fast enough. It is considered that the Commission's ToR is clearly broad enough to take in such issues, and we will be focusing our approach to the inquiry on that area.

See **Attachment**:

1. Australia's environmental debt.

- In this context we should note that the new *Environmental Protection Act* (EP Act) changes do not, in our view, provide 'effective protection of native vegetation' (Legislative Assembly quote extracted at page 7 of the IP). Indeed, the changes leave substantial biodiversity-related issues inadequately regulated, pastoral grazing and urban land clearing being just two examples.

See **Attachments**:

2. and 3. Environmental Defender's Office papers on the EP Act changes.

- We also note that the Biodiversity Conservation Act (BC Act) being developed by the Western Australian Government (noted at page 7 of the IP) is largely a very positive move.

See **Attachments**:

4. consultation paper on the proposed BC Act; and

5. the CCWA submission in response to Attachment 4.

Impacts on landholders and regional communities

- Section 2.1 emphasises that 'specific impacts' of particular legislative provisions are sought (see page 12 of the IP). While we welcome this attention to detail, the Commission should be aware that in the case of biodiversity and native vegetation regulations it will often be easier to detail specific negative examples than specific positive ones.

  One can predict that the Commission will be pointed in the direction of specific examples of supposedly harsh penalties for unlawful clearing, or significant delays for the processing of clearing applications. Unfortunately, the Commission is very unlikely to hear from landholders where the retention of native vegetation further up their catchment has reduced salinity on their farm, but there is no question that these (less obvious) positive impacts are being felt. We know this because the corollary is true – clearing or modification of native vegetation can often have adverse impacts on neighbouring properties and / or the local region (see below).

  Biodiversity conservation is such that the Commission is even less likely to hear specific positive stories, at least from landholders. The benefits of adequate biodiversity regulations are often subtle, indirect and complex.

- We are concerned about the following sentence at page 14 of the IP, under the heading 'Positive impacts on landholders':

  > *Do any of the regulatory regimes require actions that some landholders are already undertaking, or would undertake in the future, in their own interests (for example, to prevent erosion)?*

  We want to emphasise that there are myriad regulations and Government interventions that should not be necessary if people took proper heed of their own interests – speeding laws and smoking regulations are two examples. But in those examples, as in the case of primary production, regulations are necessary to try and protect the long-term interests of the people being regulated, because many of those same people often make decisions with short-term motivations.

- Even more importantly, regulations serve to protect landholders who are doing the right thing from those who are not – we are pleased to see that the IP expressly calls for:

  > *Are there cases where the clearing or modification of native vegetation or the failure to protect biodiversity on a particular property, or group of properties, may have some adverse impacts on neighbouring properties*

and / or the local region (for example, by contributing to local erosion or salinity problems)? (see pages 14 and 15 of the IP)

Large portions of the Australian landscape provide a case study in adverse impacts on neighbouring properties and local regions. It is well recognised by all but the most unwilling to change that the agricultural status quo is unsustainable – see the recently released Australian Terrestrial Biodiversity Assessment, for example.

We intend to include specific, recent examples in our final submission to illustrate this point further, but in many respects the damage caused by clearing or modifying native vegetation is a *res ipsa loquitur*.

- We do not, at this stage, have any detailed submissions on the issues of administrative costs and the government measures to mitigate them (page 16 of the IP). But we submit that some administrative costs for compliance with environmental regulations are part and parcel of modern business. There is no rationale for excluding particular types of landholders from the reasonable administrative costs associated with appropriate environmental regulations.

Efficiency and effectiveness of environmental regimes

- The conservation sector often takes issue with the efficiency and effectiveness of environmental regimes (page 17 and 18 of the IP) – but never from the perspective of seeking to reduce or weaken regulation.

  WA's biodiversity protection laws are well-recognised as being too narrow in scope and too soft in terms of penalties. The Council is very supportive of the Government's moves to introduce a BC Act, although in many respects the proposed Act does not go far enough – see above.

  The current clearing regime in WA is similarly limited and ineffective as a deterrent. The situation around the country is generally no different – indeed, clearing of native vegetation is one of the few issues that the Review of the National Strategy for the Conservation of Australia's Biological Diversity considered in June 2001 had not been adequately addressed.

  We further submit that although the incoming clearing regulations in WA represent a major step forward, they still fall short of providing 'effective protection of native vegetation' – see above.

  In short, State and Federal regulations have yet to adequately address environmental damage and biodiversity loss. Reducing the scope or strength of environmental regulations will only make things worse and is therefore unconscionable.

See **Attachments**:

2. and 3. Environmental Defender's Office papers on the EP Act changes.

6. State Government media release on 26 June 02

Adequacy of assessments of economic and social impacts

- Page 19 of the IP asks the following questions:

> *What, if any, assessments were made of the expected economic and social impacts resulting from the introduction of the regimes under review? What was the basis for these assessments (for example, what assumptions were made about the net impact on production)?*

We will address these questions in relation to the incoming clearing regulations in WA. As explained above, those regulations can only be expected to significantly reduce clearing in WA's agricultural region.

The assumption behind such an approach is one we support – clearing in the agricultural region has for far too long ignored or under-emphasised environmental assessments in favour of social or economic ones. Now that such an approach has given rise to a situation where up to a third of that land and up to 450 endemic plant species could be lost to salinity, environmental assessment should be the government's primary concern.

Sustainability is not, as is sometimes suggested, a process of trading-off between social, economic and environmental outcomes for a perceived net gain. It is widely accepted that there are minimum social and economic 'baselines' – human rights and economically viable businesses being examples. Likewise, environmental baselines must be respected. In WA there are a number of local government areas that have less than 10% of their original native vegetation cover, and in such cases it is arguable that the environmental baseline is the only relevant factor and the community should be focused on revegetation, not finding ways to clear just a little bit more.

Transparency and community consultation

- Page 20 of the IP asks:

> *What processes were used to encourage community consultation in the development of new regulatory regimes at both the Commonwealth and State/Territory levels?*

We will first address this question in relation to the incoming clearing regulations in WA. Regulations such as these have been on the agenda of various State Governments for over a decade, and have been the subject of numerous community consultation processes.

Reviews and policies which have recommended stronger clearing laws include:

- *Taskforce for the Review of Natural Resource Management and Viability of Agriculture in Western Australia*, Draft Report, May 1997;
- *State of the Environment Report (Western Australia),* 1998;
- *Land Conservation Regulation Reference Group,* Final Report, April 2001;
- *Native Vegetation Working Group Final Report,* January 2000;
- *State Salinity Strategy,* March 2000;
- *Clearing Native Vegetation in Western Australia,* Position Statement No. 2, EPA, 2000; and
- *Salinity Taskforce Final Report,* September 2001.

When the Gallop Government came to power in early 2001 it undertook to deal with the issue quickly, but only announced amendments to the *EP Act* in June of last year – see the media release above. The changes have subsequently been through a Legislative Assembly committee process.

The replacement of the *Wildlife Conservation Act 1950* has similarly been on the agenda for over a decade. The Gallop Government undertook to introduce a BC Act as a 'priority', but has still not done so – indeed, the latest consultation process for this reform only began late last year. Further consultation is planned, with the Government aiming to introduce a Bill into Parliament late this year or early next year.

See **Attachments**:

4. consultation paper on the proposed BC Act;

5. the CCWA submission in response to Attachment 4; and

7. State Government media release on 6 November 02.

- Page 21 of the IP goes on to ask a series of questions about the decision-making processes under the various regulatory regimes, notably:

  Are decision-making processes established under the regulatory regimes transparent? For instance, is the rationale for a decision allowing or rejecting a proposal to clear native vegetation explained adequately?

To what extent is there community consultation in individual decisions, such as applications to clear, under the regulatory regimes?

We do not intend to address these questions in much detail here, other than to say that both the incoming clearing regulations and proposed BC Act are considerably more transparent decision-making processes that those they replace. We note in particular that the incoming clearing regulations still contemplate a role for full Environmental Impact Assessments – one of the most transparent decision-making processes in Australia.

We support and are constantly pushing for more transparency in all decisions relating to the environment.

Options to reduce the adverse impacts of environmental regimes

- We are happy to reduce adverse impacts provided that is not done by reducing the effectiveness of environmental regimes – see above on efficiency and effectiveness. We are concerned about the following question, however:

  For example, could regimes be better targeted and/or made flexible in order to reduce adverse impacts? (see page 23 of the IP)

  In many spheres of environmental regulation 'flexibility' manifests as the failure to prosecute breaches, especially where the agency in question becomes 'too close' to the industry or key individuals they are supposed to be regulating. While we intend to address this issue in more depth in our detailed submission, suffice it to say for now that we would much prefer 'flexibility' in terms of a number of different incentive programs being made available to landholders when they retain, rehabilitate or revegetate native vegetation on their land.

- We are pleased that the IP expressly addresses the vexed issue of 'private property rights'. At page 23 the following question is posed:

  What has been the understanding of landholders about their 'right' to clear or use native vegetation on freehold or leasehold land? What is the basis for this understanding (for example, explicit or implicit property right, custom)?

  There are still some landholders who run the line that native vegetation and biodiversity regulations fall foul of their 'private property rights'.

  It is difficult to think of an example of when land can be cleared without there being some impact on neighbouring properties and / or the broader catchment. These other landholders have the right to be protected from the land degrading

activities of others – and such rights are more effectively protected by regulation than by the common law.

See **Attachment**:

8. ACF paper on property rights

- Another hotly debated issue is the subject of these questions at page 23 of the IP:

> *What is the responsibility of landholders to the environment? What is their responsibility to their neighbours and local community? What is their responsibility for broader environmental goals (or 'public goods') such as biodiversity conservation? How should the extent of landholders' environmental responsibilities be determined?*

We will address these matters in more detail in our final submission. Suffice it to say for now that we challenge the premise to these questions and strongly submit that current environmental regulations, in the main, will benefit landholders in the long term. Biodiversity conservation is not some esoteric 'public good' – its central goal is the long-term maintenance of the health of the planet that keeps us all alive.

We would also recommend that the Commission consider the *Taskforce for the Review of Natural Resource Management and Viability of Agriculture in Western Australia*, Draft Report, May 1997 (see in particular pages 8 to 10).

- A related set of questions appear at page 24 of the IP:

> *Should landholders be expected to bear any of the cost of achieving community-wide environmental goals? Should they be expected to bear all of the cost?*

Some environmental goals cannot be achieved unless certain activities, including clearing native vegetation, are halted and reversed. Where that is not the case, it is submitted that the notion of the 'polluter pays' should be central – no matter what the business or industry. This notion can be summarised as follows:

(i) the full costs of environmental harm should be an impost on those causing it, to be ultimately passed on to the consumer;

(ii) those costs include damage done to the productivity of their neighbours and their local community;

(iii) the costs of biodiversity loss are, in some cases, impossible to quantify, but Governments should impose a levy for them anyway; and

(iv) the levy or levies referred to at (iii) should be used to fund biodiversity regeneration projects and the administration of environmental regulations.

We should clarify that we do not oppose the public funding of some environmental projects that also benefit landholders (such as many of those funded under NHT, for example). The key point is, as set out above, that the community should not be expected to be the only source of funds for behaviour that will benefit landholders in the long-term.

See **Attachment**:

8. ACF paper on property rights

- Finally, page 24 of the IP opens up the compensation debate again

Should landholders be compensated for the impact of regimes that restrict their ability to utilise, modify or remove native vegetation? Why or why not?

We do not support compensation for regulations that will benefit the people doing them and / or that prevent them from behaving inappropriately. Compensation also raises a series of practical difficulties – see the attachment below.

See **Attachment**:

9. Keith Bradby's paper on compensation

Attachment 1

Australia's environmental debt

By Chris Tallentire, Conservation Council

Recently estimates have been made of the environmental debt that Australia has already incurred through land degradation. There are many sound arguments for large amounts of public money to be invested in the repair of damaged rural landscapes. The Conservation Council is largely supportive of such expenditure of public money.

The Council understands that the majority of landholders see that it would be hypocrisy for people in their industry to request taxpayer funded financial assistance to counter salinity and other forms of environmental loss while continuing to allow the causes of the problem to persist. Foremost amongst these mistakes is the clearing of native vegetation. Estimates of the cost of repairing the landscape give an indication of the scale of the problem. The estimates also give a powerful justification for constraining landholders from repeating the mistakes of the past.

The House of Representatives Standing Committee on Environment and Heritage, Chaired by Hon Ian Causley MP, considered the costs associated with repairing the landscape. In the report *Co-ordinating Catchment Management - Inquiry into catchment management,* tabled in Federal Parliament in February 2001, a number of estimates were presented that calculated Australia's "environmental repair bill." Some of these estimates are outlined below.

- Dr Carl Binning from the CSIRO has said that over the next ten to twenty years, 'at least $100 billion had to be pumped into the environment'.[1] This would require, on average, $5 billion to $10 billion per annum.

- A study prepared for the National Farmers Federation and the Australian Conservation Foundation[2] determined that a capital investment of $60 billion was required over a ten year period, with an annual maintenance program of $0.5 billion. This would represent a total annual investment of $6.5 billion from all sources. Public expenditure would need to be about $33.5 billion over the decade, involving $3.7 billion per year, including an ongoing maintenance program of $320 million per annum. While these estimates have been made at a national level, it is to be assumed that WA would require a third of all national environmental funding.

- The Commonwealth Treasury secretary Mr Ted Evans has recorded that the cost of repairing the Murray-Darling Basin will be at least $30 billion.[3] It is

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1 M Moscaritolo, 'Put a price on nature', *The Herald Sun*, 22 September, 2000, p. 52.

2 NFF/ACF, National investment in rural landscapes, April, 2000, p. i.

3 P Coorey, 'At last, environment is on the agenda', *The Advertiser*, 10 July, 2000; P Cleary, 'Treasury warns on surplus', *The Financial Review*, 7 July, 2000.

expected that similar amounts will be necessary in WA to repair the impacts of salinity, soil acidification, water logging, water and wind erosion, eutrophication and soil nutrient imbalances.

It is to be noted that the estimates allow only for the rehabilitation of land degradation. They are not an estimate of the cost of restoring all biodiversity values. To provide such a cost of rehabilitation figure, at a property scale, it is worth recording that the Alcoa company spends an average of $24,000 per hectare on its ecological restoration work.

To repair and manage damaged rural landscapes substantial sums will have to be invested on freehold and leasehold land. It is unrealistic to expect public support for the required levels of public expenditure to be forthcoming if some landholders continue to argue their right to continue to make the mistakes of the past.

The extent of environmental degradation in Australia is such that the European Union is arguing that ongoing environmental degradation is a hidden subsidy on cheap exports. The EU is looking to use World Trade Organisation rules to resolve this issue.

Attachment 2

ISSUES PAPER ON ASPECTS OF THE Environmental Protection Amendment Bill 2002

Lee McIntosh
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On 27 June 2002 the *Environmental Protection Amendment Bill 2002* ("the Bill") was introduced into State Parliament. This paper outlines the issues which arise from the changes the Bill seeks to make to the *Environmental Protection Act 1986* ("the Act") in respect of:

- Environmental impact assessment;
- Licences and works approvals;
- Enforcement;
- Financial Assurances;
- Codes of Practice;
- Appeals Convenor; and
- Bilateral Agreements.

ENVIRONMENTAL IMPACT ASSESSMENT

1. Referrals (Section 6 of the Bill)

EPA's power to call in proposals under an assessed scheme

The EPA retains its power to call in any proposal which is likely, if implemented, to have a significant effect on the environment: 38 (5c). However, in relation to proposals under an assessed scheme, the Bill provides that the EPA can only use its call in power if the EPA did not, when it assessed the scheme, have sufficient scientific or technical information to enable it to assess the environmental issues raised by that proposal: 38 (5e).

Note that the Bill provides that the EPA may use its (limited) call in power despite the fact that a local authority did not consider that the proposal should be referred: 38 (5f)

Referral of strategic proposals

The Bill creates a new class of proposal known as a "strategic proposal" (see section 5), and provides that only proponents will be able to refer "strategic proposals" to the EPA: 38 (3). This means the Minister may not refer strategic proposals to the EPA, the EPA cannot call in strategic proposals, local government has no responsibility or power to refer strategic proposals, and no other person has the power to refer strategic proposals.

Re-referral of incompletely assessed proposals

The Act is currently silent as to whether a proposal which is incompletely assessed can be re-referred to the EPA. The Bill makes it clear that proposals can indeed be referred again if the assessment of those proposals is terminated under the Act: 38 (5j)

Issues

- The Bill still does not provide a list of prescribed proposals which must be referred to the EPA.
- There is still no power to re-refer a proposal if environmental circumstances change or if new knowledge is discovered.
- The prohibition on members of the public referring proposals under assessed schemes remains.
- The Bill provides that only proponents can refer strategic proposals.

2. EPA's power to refuse to accept referrals (Section 7 of the Bill)

Currently the Act does not prescribe any circumstances in which the EPA must refuse to accept a referral, and consequently the EPA's power to refuse to a referral is constrained

only by principles of administrative law and good decisionmaking. However, the Bill now provides the EPA with a specific power to refuse to accept a referral if it considers that there is some good reason for so refusing: 38A (2). Further, the EPA *must* refuse to accept a referral if it considers that the proposal is not likely, if implemented, to have a significant effect on the environment or is not a strategic proposal: 38A (1).

The Bill provides that the EPA must give notice of its decisions to refuse to accept a referral within 14 days of that referral. The EPA's decisions may be appealed to the Minister: 100 (1) (except if the decision is made on the basis that the referral has already been referred, in which case no appeal is available: 38A (6)).

Issues

- The EPA will no longer have the discretion to accept a referral even if the proposal does not appear to be likely to significantly affect the environment. This will mean the EPA must engage in a far greater level of "pre-assessment" of the impacts of a proposal than is currently the case, as the EPA will have to determine from the outset whether a proposal is likely to have a significant impact on the environment.
- The EPA will have a broad statutory power to refuse to assess a proposal even if it is likely to have a significant effect on the environment. The breadth of this power will make it difficult to judicially review.
- The Minister has the power to refer a proposal to the EPA because there is public concern about it: section 38 (4). However, the EPA will be obliged to refuse to accept the referral if it does not appear to be likely to significantly affect the environment.
- Disputes could arise about whether a proposal is "new" or simply an amended version of a proposal which has already been referred to the EPA. However, there is no ability to appeal to the Minister from the EPA's decision in respect of whether a proposal is a new proposal or not.

3. EPA can require further information in deciding whether to assess a proposal (Section 7 of the Bill)

The Bill now provides that the EPA can issue a notice to any person requiring that person to provide the EPA with additional information if the EPA considers that it does not have sufficient information in order to make a decision:

- Whether to accept a referral;
- Whether to assess a proposal;
- Whether a proposal is a "derived proposal"; and
- The level of assessment to which a proposal should be subjected.

The time in which the EPA must make its decision whether to assess a proposal does not begin to run until the information is received or from the time in the notice expires: 38B. There is no penalty if the information is not provided.

Issues

- The EPA could use this power to require information from people who don't have it, rather than simply requiring the proponent to provide the necessary information. The EPA currently has the power, as does any person, to *request* information from third parties.. However, as section 38B relates only that the EPA's power to *require* information, it is arguable that it should be restricted to proponents.
- There is no penalty if a person does not provide the information sought.
- It is not an offence to commence to implement the proposal before the EPA has decided whether or not to assess the proposal.

4. EPA's decision whether to assess a proposal (Section 8 of the Bill)

The Act does not currently prescribe any factors which the EPA may have regard to in deciding whether or not to assess a proposal. The Bill now provides that the EPA must make its decision whether or not to assess a proposal based only upon the referral information or from information derived from its own investigations and inquiries: 38A (2).

The Act is currently silent as to when the EPA must commence its assessment. The Bill now provides that the EPA must commence the assessment as soon as practicable after it has made its decision to assess a proposal: 38A (6).

The EPA retains its power to issue informal advice and recommendations to decisionmaking authorities even when it decides not to formally assess a proposal: 38A (7). The Bill does not, however, make such advice legally binding or require any person to take the advice or recommendations into account.

Issues

- It is still not an offence to implement a proposal before the EPA has decided whether or not to assess a proposal.
- It is not clear whether the restriction on the matters which the EPA may consider when making its decision precludes the EPA from taking into account the "environmental principles" set out in section 4A of the Bill. This should be clarified.
- The requirement that the EPA commence its assessment "as soon as possible" appears to ignore the fact that there is a 14 day appeal period which should be concluded before the assessment begins.
- It is concerning that while the Bill retains the EPA's power to give informal advice without inserting an associated provision that such advice be binding, or even a requirement that the advice be taken into account. It is also concerning that, as the "informal advice and recommendations" process is less procedural and time-consuming than formal assessment, it is attractive and therefore used frequently - but will continue not to have binding or enforceable consequences.
- The EPA's *Administrative Guidelines 2002* provide that in considering whether or not to assess a proposal, the EPA will consider the ability of decision-making authorities to place conditions on the proposals to ensure required environmental outcomes are

achieved. Such considerations are arguably impermissible as they may relate to matters which the EPA should assess itself, rather than relying on another agency which may/may not assess them. Further, the mere fact that another agency has the power to impose particular conditions does not mean that it will in fact do so in a particular case. The Bill should therefore specifically restrain the EPA from taking such considerations into account (similar considerations apply in respect of proposed section 44 (2) (b) (ii) of the Act).

5. Strategic Assessment and Derived Proposals (Section 5, 8, 10 and 17 of the Bill)

The Bill creates a new type of "strategic proposal" which the EPA may assess. A strategic proposal is one which may not of itself have a significant effect on the environment but which identifies:

- A future proposal that will be a significant proposal; or
- Future proposals which are likely, if implemented, to have a significant effect on the environment: 37B.

Strategic proposals may only be referred to the EPA by a proponent. They cannot be referred to the EPA by any other person (including the Minister) and cannot be called in by the EPA.

Strategic proposals are assessed by the EPA and determined by the Minister in the same way as other proposals. However, contrary to the law in respect of other proposals, to the extent that a strategic proposal is not also a "significant proposal", decisionmaking authorities can make decisions which will have the effect of allowing the implementation of the strategic proposal, and it is not an offence for a person to implement a strategic proposal before the assessment is concluded: 40B.

If the Minister has determined that a strategic proposal may be implemented, a proponent may refer a new "derived" proposal to the EPA. A derived proposal is one which is derived from the strategic proposal. The EPA must then decide whether a new proposal is in fact derived from the strategic proposal ("derived proposal"): 39B. The EPA can refuse to accept that a proposal is a derived proposal in the basis that:

- The environmental issues raised by the proposal were not adequately assessed when the strategic proposal was assessed;
- There is significant new or additional information that justifies the re-assessment of the issues raised by the proposal; or
- There has been a significant change in the relevant environmental factors since the strategic proposal was assessed.

This list is not exclusive. If the EPA determines a proposal is not a derived proposal, it will be treated as a fresh proposal. If the EPA determines the proposal is a derived proposal, the derived proposal will not be assessed and may be implemented in accordance with the implementation conditions of the strategic proposal. However, the

Minister can request that the EPA inquire into whether the conditions which attach to the approval of the strategic proposal should be changed in light of the derived proposal: 46 (4).

The EPA's decision to declare a proposal a "derived proposal" may be appealed by any person to the Minister: 100 (2) (f). In addition, the proponent has an additional appeal right if the EPA decides a proposal is *not* a derived proposal: 100 (2b)

Issues

- Strategic proposals may only be referred to the EPA by a proponent.
- Other decision-makers are not required to await the EPA's assessment before making decisions about a strategic proposal even though the EPA's assessment may in fact raise important issues for those decisionmakers. Unless those decisionmakers have a specific power to amend the conditions of their approvals after they have issues those approvals, those decisionmakers will not be able to alter their decisions to take into account the matters raised by the EPA's assessment. Other decisiomakers should therefore be required to await the strategic assessment before making a decision.

6. Minister's power to direct the EPA (Section 13 Bill)

The Minister currently has and will retain the power to direct the EPA to assess a proposal which has been referred to it, or to assess or re-assess a proposal more fully and/or more publicly. The Bill now provides that the Minister must give reasons for such directions to the EPA. The Bill also provides that the Minister cannot make directions if the Minister has already made a decision about a proposal: 43.

Issues

- The Bill provides the EPA with a new power to refuse to accept a referral (38A (2)), but does not provide an associated new power for the Minister to direct that the EPA accept or refuse a referral. This will create an inconsistent approach to Ministerial oversight in the Bill.
- The Minister is now specifically excluded from directing the EPA to re-assess a proposal once she has made a decision that it may be implemented. However, there may be circumstances where it is in fact appropriate for the Minister to make such a direction, for example, where new information about a proposal has come to light, or values about environmental protection have changed. While the Minister retains the power to direct the EPA to inquire into whether conditions should be altered (46B), the Minister is now specifically prohibited from directing a re-assessment of the entire proposal.

7. Termination /suspension of assessments (Section 10 of the Bill)

The Act does not currently provide the EPA with a power to either terminate or suspend the assessment of a proposal. The Bill now provides that the EPA has a specific power to terminate or suspend an assessment if:

- the proponent agrees to that termination/suspension;
- the proponent fails to take an action directed by the EPA in a timeframe in which the EPA considers reasonable; or
- another decision-making body has refused to approve the proposal.

However, an assessment cannot be terminated if it is the subject of a 14 day appeal period, or is actually being appealed: 40A.

Issues

- The Bill provides a very limited set of circumstances in which an assessment may be terminated. There are many more situations in which the EPA should have the power to terminate, or at least suspend, an assessment. For example, assessment of coastal land-use proposal should arguably be terminated while the EPA develops a coastal zone Environmental Protection Policy, or at least while the government's various inquiries into this area are underway. The EPA should therefore be provided with a broad power to terminate/suspend the assessment of proposals.

8. Changes to proposals during assessment (Section 14 of the Bill)

The Act does not currently provide any specific power for a proponent to make changes to a proposal during the assessment period. The Bill now provides that the EPA may consent to the proponent making changes to the proposal before the EPA completes its report to the Minister if the EPA considers that the change is unlikely to significantly increase any impact that the proposal may have on the environment: 43A.

Issues

- The public may not necessarily know about the changes a proponent has made during and assessment and may not be provided with an opportunity to comment on them.
- As the Bill provides the EPA with a broad discretion to permit changes, it will probably be difficult to judicially review the EPA's decision to allow a proponent to change their proposal.

9. Changes to approved proposal/ implementation conditions (Section 17, 18 of the Bill)

Change to proposal

The Act currently does not provide the Minister with a specific power to approve changes to implementation conditions, though the Minister permits such changes in practice. The Bill now provides the Minister with a specific power to approve various changes to implementation conditions. However, the Minister must not issue such any such approval if she considers the change might have a significant detrimental effect on the

environment which is in addition to, or different from, the effect of the original proposal: 45C.

Minor change to implementation conditions

The Bill provides that the Minister has a specific power to change the implementation conditions without requesting the EPA to conduct an assessment into the changes if she considers that the change is of a minor nature and is necessary or desirable in order to:

- Standardise the implementation conditions applying to different proposals;
- Correct a minor mistake; or
- Make an administrative change that does not alter the obligations of the proponent.

If the Minster decides to make such a change, she must cause notice of the change to be published: 46C.

Inquiry into change to implementation conditions

The Bill retains the Minister's power to request that the EPA inquire into whether any of the implementation conditions should be changed, and the EPA retains its power to hold such an inquiry using all of its regular powers. However, the Bill additionally now provides that a public record must be kept of any such Ministerial request: 46.

Note that the EPA can hold an inquiry into the implementation conditions even when it is assessing a revised/further proposal: 46B.

Interim change while inquiry is being undertaken

The Act does not currently make any provisions for any interim changes to be made to conditions while an inquiry is being conducted into those conditions. The Bill now provides that the Minister has the power to issue interim conditions and procedures while the EPA is conducting an inquiry into whether the implementation conditions should be changed. The Minister cannot, however, issue interim conditions if the Minister considers that implementation of the proposal under the interim conditions and procedures might have a detrimental effect on the environment in addition to, or different from, the effect the proposal might have if implemented under the original conditions: 46A

Major change to implementation conditions

The Bill retains the power of the Minister and any decisionmaking authority to agree that a proposed change to the conditions is a major change, in which case the decisionmaking authority must refer the proposal to the EPA as a new proposal: 46B(2).

Issues

- The Minister has broad discretion to permit changes to implementation conditions without reference to the EPA. She does not have to refer any particular changes to the EPA. This discretion will be difficult to judicially review.
- Major changes may only be referred as a new proposal with the agreement of the Minister and other decision-making authorities. If another decisionmaker does not agree that the proposal should be assessed as a new proposal, the proposal will not be re-referred or re-assessed.
- There is no requirement for implemented proposals to be periodically, say every 5 – 7 years, reviewed in order to determine whether the proposal is still environmentally acceptable.

10. EPA's report and recommendations (Sections 9 and 15)

The Bill provides the EPA with a new broad power to make any investigations or inquiries into a proposal which it thinks fit, as well as retaining the EPA's specific powers to require a proponent to prepare an environmental review or hold a public inquiry: 40 (2a).

The EPA is no longer obliged to prepare a report to the Minister within 6 weeks of completing its investigations, but rather must now comply with this timeframe as far as is practicable: 44 (1).

The Act does not currently provide the EPA with a specific power to consider the conditions to which other decision-making authorities may subject a proposal to. The Bill now provides the EPA with the power to report and recommend in respect of decision-making authorities to whose requirements the proposal will be subjected to: 44 (2) (b) (ii).

Issues

- Section 44 (2) (b) (ii) will provide the EPA with formal power to defer consideration of some matters to other decisionmaking bodies. At present EPA it is arguable that the EPA cannot make any decision which relies upon the fact that some matters may be considered by other decision-making bodies, as such a decision would not be final. The Bill will however give the EPA a specific power to defer consideration of some matters to other decision-making bodies. Given that the EPA already makes some decisions which defer matters to the consideration of other bodies (such as the Department of Environmental Protection, the Department of Aboriginal Affairs or the Water and Rivers Commission), it may be that the new power is extensively used. As most other decision-makers' processes are not open to pubic scrutiny, allowing the

EPA to defer to other decision- is inconsistent with the regime of environmental impact assessment set out in the Act.

- The EPA retains its broad discretion to determine the form and content of any environmental impact assessment: 40 (3). The EPA has developed administrative guidelines and guidance statements which provide some administrative constraints on the form and content of assessments, but these documents are not legally binding and are unlikely to be enforceable. The Bill does not clarify the status of these documents, and does not impose any minimum requirements upon proponents with respect to environmental impact assessment.

11. Offences (Sections 12 and 25 of the Bill)

The Act does not currently provide that it is an offence to carry out work before the Minister has made a decision about an assessed proposal. The Bill however now provides that it is an offence to implement a proposal before the Minister for the Environment has determined that it may be implemented. The maximum penalty is $125,000 for corporations with a $25,000 daily penalty and $62,500 for individuals with a daily penalty of $12,500: schedule 1.

It is now also a specific offence to implement a proposal if a statement that a proposal may not be implemented has been issued: 47 (4). However, no penalty is specified!

It remains an offence for a proponent to fail to ensure that a proposal is carried out in accordance with the implementation conditions: 47 (1).

The EPA retains the power to consent to minor or preliminary work being done before the Minister's decision: 41A

Issues

- The EPA retains the power to consent to minor or preliminary work being done on a proposal before the Minister's decision.

12. Monitoring implementation of proposals (Sections 19 and 20 of the Bill)

The Act does not currently provide any specific power to the CEO to require reports about compliance with implementation conditions. The Bill now provides the CEO with a specific power to give a proponent written notice requiring reports and information about the implementation of a proposal and compliance with the conditions: 47 (2). It is an offence to fail to comply with such a notice without a reasonable excuse: 47 (3). The maximum penalty is $50,000 for both individuals and body corporates.

The Act currently provides that the CEO does not have the power to monitor any implementation conditions which are subject to the requirements of another decision-making authority. The Bill now provides that the CEO has the power to monitor *all* implementation conditions, including those which are subject to another decisionmaking

authority: 48 (1). (Note that decision-making authorities retain their current power to monitor compliance with relevant conditions.) If either the CEO or the decisionmaking authority find that the conditions are not being complied with, they must report the non compliance to the Minister: 48 (1) – 48 (4).

13. Appeals (Sections 23 and 24 of the Bill)

All existing appeal rights remain unchanged. The Bill creates additional appeal rights in respect of derived proposals and the EPA's decision not to assess a proposal: 100.

Proponents no longer have the right to appeal a section 48 (4) (a) order made by the Minister requiring that proponent to stop the implementation of that proposal for a period not exceeding 24 hours: 100.

Issues

- Under the Act, only proponents have the right to appeal in respect of the conditions which the Minister sets on a proposal, and only proponents have the power to appeal in respect of the EPA's assessment of town planning schemes. The Bill does not seek to change this.

Other Issues

EPA members' conflict of interest

Section 12 of the Act provides that an EPA member who has a direct or indirect pecuniary interest in a matter that is before a meeting of the EPA must disclose the nature of that interest and may not vote on the matter but may take part in the consideration or discussion of the matter. This permits EPA members to discuss proposals upon which they themselves have employed as consultants.

The common law test of bias of administrative decisionmakers is:

> "whether the relevant circumstances are such as would give rise, in the mind of a fair minded and informed member of the public, to a reasonable apprehension or suspicion of a lack of impartiality on the part of the decision-maker."

Section 12 of the Act overrides this common law rule by allowing EPA members to participate in the discussion of matters in circumstances where the common law rule against bias would normally exclude them from such discussions. This is often of concern to members of the community and has been the cause of some mistrust of the EPA's decisions.

The Bill does not propose any changes to section 12.

Assessment of health impacts

Recommendation 8 of the Economics and Industry Standing Committee "Bellevue Hazardous Waste Fire Inquiry" Report No 2 Volume 2 provides that "The Environmental Impact Assessment process as contained within the *Environmental Protection Act 1986* be expanded to:

- Incorporate a health impact assessment where appropriate; and
- Involve the Health Department of Western Australia in the process of the health impact assessment."

The Bill does not include any such recommended changes.

Typographical errors

- Bill section 21 -refers to (2C) (d) where it should refer to (3a) (d).
- No penalty is specified for breach of 47 (4) (offence of implementing a proposal after receiving notification that proposal may not be implemented).

LICENSING AND WORKS APPROVALS

1. Licensing/works approvals procedures (sections 43, 69 – 76 of the Bill)

The Act currently provides that a person must obtain a works approval to increase or alter the volume of emissions from a premises. The Bill broadens the circumstances in which a works approval is required and provides that a works approvals is also required if a person wishes to alter the nature or volume of its emissions: 53.

The Act currently does not impose any record keeping obligations upon the DEP with respect to works approvals and licences. The Bill now provides that the CEO must keep a record of all works approval and licences, as well as all applications and transfers of works approvals and licences. The exact details required to be kept in the record will be set out in regulations: 63A. The Bill now also provides that the CEO must give written notice of a refusal to grant a works approval: 54 (3a) and licences (57 (3a)).

The Bill now provides that CEO is not required to proceed with an application for a works approval/licence if another decision-making body refuses to allow the proposal to go ahead: 54 (5), 57 (4a).

The Bill now provides that any works approvals or licences which are issued must be in accordance with a Part IV implementation decision: 54 (4) (b), 57 (4) (b).

Issues

- The Act still fails to provide for comprehensive public consultation upon the issue of licences/works approvals – the CEO need only consult those people who the CEO considers have a "direct interest" in the issue of the licence.
- The Act still fails to require that the CEO to provide reasons in respect of a decision issue or a works approval or licence.
- The Economics and Industry Standing Committee "Bellevue Hazardous Waste Fire Inquiry" Report No 2 Volume 2 found that there is no mechanism for local government to be notified of changes to or expansion of activities once a licensed business has become operational: page 23. The Bill does not address this.

2. Amendment/revocation/suspension of licence/works approvals (Section 77 of the Bill)

At present the Act provides for the amendment, revocation or suspension of a licence but makes no provision for amending, revoking or suspending works approvals. The Bill now provides that the same provisions in these respects (being sections 59, 59A, and 59B) apply to both licences and works approvals.

Section 59 provides that the CEO may make amendments to licences/works approvals to remove, vary or add a condition or make various amendments to a licence/works approval either at the request of a licence/works approval holder or the initiative of the CEO. Section 59A provides that the CEO may revoke or suspend a licence if she is

satisfied that there has been a breach of conditions, if information in the application was false or misleading in a material respect, the business address of the holder is unknown or if the applicant has applied to surrender: 59A.

Issues

- The Bill sets out very particular grounds upon which the CEO may amend/revoke/suspend a works approval or licence. There may well be other matters which arise which are not included in these lists. The lists should therefore be inclusive only and the CEO should be provided with a general discretion to amend/suspend/revoke licences and works approvals.

3. Conditions of works approvals/licences (Section 79 of the Bill)

The Act currently sets out specific matters which may form the content of licence/works approvals conditions. The Bill now provides that the conditions can relate to any matter which the CEO considers necessary or convenient for the purpose of the Act: 62 (1). A list of possible conditions is retained in section 62A, but the list is no longer exclusive.

ENFORCEMENT

1. Environmental Protection Notices (Section 45 of the Bill)

Pollution abatement notices are now to be known as "environmental protection notices": 65.

The Act currently provides that the CEO cannot issue a pollution abatement (environmental protection) notice unless she is satisfied that an unlawful or polluting offence has occurred or is likely to occur. The Bill now provides that the CEO need only suspect on reasonable grounds that a person is or is likely to commit and offence under the Act in order for the CEO to issue an environmental protection notice: 65 (1).

The Act currently provides that a notice may direct a person to take such measures as the CEO considers necessary to prevent, control or abate the emission. The Bill retains this power and further provides that an environmental protection notice may require a person to investigate emissions and their consequences, prepare and implement a plan to prevent, control or abate the emission, and ensure an emission does not exceed a particular limit and report on any actions it takes: 65 (1a).

An environmental protection notice must specify the name of the person it is issued to, the reason it is served, describe the premises, set a time limit for compliance with the directions in the notice and set out particulars of the actions required: 65 (2).

In other respects the environmental protection notice will be the same as a pollution abatement notice. For example, the CEO must give a person on whom she intends to serve the notice a reasonable opportunity to show cause why the notice should not be issued (65 (6-7))). The penalty for breaching a notice with intent or criminal negligence is $250,000 for an individual with a continuing penalty of $50,000 per day and $500,000 for an corporation with a continuing penalty of $100,000 per day (65 (4a)). The penalty for breaching a notice without any requisite intent is $162,500 for an individual with a continuing penalty of $32,500 and $325,000 for an corporation with a continuing penalty of $65,000 per day (65 (5)). The notice binds successive landowners if it is registered on land (65 (3)).

Issues

- The CEO cannot issue a notice unless she first gives the person to whom she intends to serve the notice of her intention and provides at least 21 days for the person to show cause why the notice should not be issued. An environmental protection notice is therefore not suitable to deal with emergency situations. However, immediate threat of pollution can be dealt with by way of a prevention notice.

2. Closure Notices (Section 81 of the Bill)

The Bill provides for a new type of enforcement notice, being a "closure notice".

If the CEO considers on reasonable grounds that, as a result of anything done on an authorised premises before the authorisation for that premises is expired or revoked, either ongoing investigation, monitoring or management will be required, the CEO may issue a "closure notice": 68A. A closure notice may require a person to take specified investigation/ monitoring actions, prepare a management plan, take management action, or report or arrange for an audit.

The notice must specify the name of the person receiving the notice, the reason for the giving of the notice and specify the actions required to be taken pursuant to the notice. The closure notice must be given to each owner and occupier of a premises as well as whomever holds the authorisation to carry out the works. The CEO must give a person on whom she intends to serve the notice at least 21 days to show cause why the notice should not be issued (65 (6-7)): 68A (10).

The penalties and offences for breach of a closure notice are as for an environmental protection notice. A closure notice binds successive landowners if it is registered on land pursuant to section 66 (65 (3)).

If the action specified in the closure notice is not taken, the CEO may cause the action to be taken and recover the cost from the person on whom the notice was issued: 68A (11).

Issues

- There is no power to issue a closure notice to any premises which is not already the subject of some kind of authorisation under the Act. That is, there is no power to issue a closure notice to an illegal premises.
- The CEO cannot issue a notice unless she first gives the person to whom she intends to serve the notice of her intention and provides at least 21 days for the person to show cause why the notice should not be issued. A closure notice is therefore not suitable to deal with emergency situations. However, immediate threat of pollution can be dealt with by way of a prevention notice.

3. Prevention notice (Section 52 of the Bill)

A DEP officer who reasonably suspects that an offence has been or is likely to be committed may give a person a prevention notice: 73A. The notice may require the person to take action to prevent the unlawful harm, pollution or discharge occurring.

If a person who is not the occupier or the polluter receives a prevention notice, that person may recover their costs of complying with the notice from the CEO: 73A (3). The CEO may then recover those costs from the occupier or polluter: 73A (4).

It is an offence to fail to comply with a prevention notice. The maximum offence for the offence if committed with intention or criminal negligence is $500,000 for a corporation

with a daily penalty of $100,000 and $250,000 for an individual with a daily penalty of $50,000. If the offence is committed without intention, the maximum penalty is $125,000 for a corporation with a daily penalty of $25,000 and $62,500 for an individual with a daily penalty of $12,500.

Issues

- Any person who is required by a notice to take such action in circumstances where they were not the polluter may recover the costs of taking action from the CEO. This ignores the fact that future landowners who may be required to take action under a notice may have in fact had notice that there was pollution on the land, and may therefore have acquired the land at a lower than market price. Such a person should not be able to recover the cost of complying with the notice.

- The Economics and Industry Standing Committee "Bellevue Hazardous Waste Fire Inquiry" Report No 2 Volume 2 at page 59 recommendation 11 states that the *Environmental Protection Act 1986* should be amended to provide for court-sanctioned closure and seizure power where a high risk to human populations or the environment exists, whether form licensed or unlicensed waste operations. The Bill does not address this issue.

4. Inspectors may carry out works (Section 51 of the Bill)

The Act currently provides that officers may only carry out works to remove or prevent waste if waste has been discharged or pollution is likely to arise. The Bill now provides that officers can carry out work if they reasonably suspects that waste is being discharged, pollution is occurring or environmental harm is being or is likely to be caused: 73 (1).

The CEO retains the power to recover the costs of work done to remediate/prevent emissions/harm from any person who caused the discharge, who caused or allowed the likelihood of pollution or who caused or allowed the likelihood of environmental harm: 73 (3).

5. Damage for breach of notice (Section 52 of the Bill)

If a person fails to comply with an environmental protection notice, vegetation conservation notice or prevention notice, and damage is caused to property not owned by that person which damage would not have been caused has there been compliance with the notice, the owner/occupier of the damaged land has a right of action in tort against the person in respect of the damage. This represents a new statutory tort – nuisance, negligence or trespass need not be shown: 73B.

6. Appeals (Section 63 of the Bill)

Any person who is aggrieved by a requirement in an environmental protection notice, closure notice or prevention notice may appeal to the Minister within 21 days: 103. The notice continues to have affect for the appeal period.

7. Record of notices (Section 44 of the Bill)

The Bill provides that the CEO must keep a record of environmental protection notices, prevention notices and closure notices as prescribed in the regulations: 64A

FINANCIAL ASSURANCES (Section 87 – 89 of the Bill)

The Bill introduces new provisions enabling the Minister (under Part IV) or the CEO with the Minister's approval (under Part V), to require that a person provide a "financial assurance".

A financial assurance can be given by way of bank guarantee, bond, insurance policy other form of security specified by the CEO. A financial assurance can be required of a proponent, a works approval/licence holder, clearing permit holder, or a person served with an enforcement notice. The CEO can require the financial assurance before the relevant approval is given.

It is an offence not to comply with a requirement to give a financial assurance: 86B (2). The maximum penalty is $125,000 for corporate bodies with a $25,000 daily penalty and $62,500 for individuals with a $12,500 daily penalty.

In determining whether to impose a financial assurance, the CEO/Minister is to have regard to a number of factors, including degree of environmental harm likely or clean up required, and the environmental record of a person: 86C. The list of considerations is not exclusive. The amount of the assurance may not exceed an amount which in the opinion of the CEO is a reasonable estimate of the total likely costs and expenses that may be incurred in taking action: 86D.

The CEO/ Minister may recover costs of taking remedial action from the person who gave the financial assurance. Before they so recover, they must give the person at least 30 days to make representations, and must give reasons for their decision: 86E.

The CEO has the power to cause a financial assurance to lapse if she is of the opinion that the assurance is no longer required: 86F.

Calling on financial assurances does not affect any other rights of recovery under the Act: 86G.

CODES OF PRACTICE (Section 65 of the Bill)

The CEO may issue codes of practice in respect of activities which involve an emission or environmental harm. Such Codes must be developed in consultation with the EPA and other bodies which the CEO considers appropriate. The Codes must be published in the gazette and are subject to parliamentary disallowance: 122B.

Issues

- The development of Codes should not form an alternative to adequate environmental impact assessment and/or licensing of activities. They should be supplementary to, rather than a replacement of, existing regulatory tools.

APPEALS CONVENOR (Sections 98 to 104 of the Bill)

The Appeals Convenor is now formally established by the Bill: 107A to 107D. The Appeals Convenor has all the existing powers of the appeals committee under 109. That is, the Convenor is to act according to equity, good conscience and the substantial merits of the case, without regard to technicalities or legal forms, shall not be bound by any rules of evidence and may conduct its inquiries in whatever manner it considers appropriate: 107B.

The Appeals Convenor may convene an appeals panel (107C) and may make administrative guidelines for appeals: 107D.

The Appeals Convenor fulfills the role normally fulfilled by the Minister in the initial stage of the appeal. That is, the Convenor requests the EPA/CEO provide reports on the appeal: 106. The Appeals Convenor must consult with the CEO and the appellant in the case of an appeal against a decision of the CEO, must consult with the EPA in respect of a decision against a decision of the Minister/EPA, and may consult any other person it considers necessary: 109 (1) (a).

The Appeals Convenor may not hold office for more than 5 years, and may be removed by the Governor for misbehavior or incompetence: Schedule 7.

BILATERAL AGREEMENTS (Sections 105 to 108 of the Bill)

The Bill provides a specific power for the EPA to have regard to a bilateral agreement entered into under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth). The Bill also permits the EPA to prepare guidelines under the agreement and to require a proponent to do anything to give effect to an agreement and to make its report in a way that satisfies the agreement: 17.

OTHER ISSUES

Board of consultants/auditors

The Bill does not propose to require the EPA/DEP to prepare a list of approved auditors and consultants, does not impose a duty on auditors/consultants to provide accurate information to the EPA/DEP and does not provide the EPA/DEP with a power to select the consultant/auditor in a particular case . The *Contaminated Land Management Act 1997* (NSW) and the *National Environmental Protection Measure* in respect of contaminated land provide examples of how these measures could operate to ensure the independence of consultants and auditors

Reasons for decisions

While the Bill provides for specific instances in which the EPA/Minister/CEO must provide reasons for decision, there are by no means comprehensive requirements in the Act for reasons for any decision to be given. However, Volker notes:

> "Probably the most significant of all the changes for improving administration was the requirement to provide written statements of reasons and findings of fact. This meant that public servants had to be more systematic and disciplined in their approaches to decision making. They even had to ensure that their decisions were in accordance with the applicable legislation and any policy guidelines that might apply."[4]

The fact that many decisions are made on an opaque and confidential basis without the requirement to provide reasons for decision means that it is very difficult to determine whether that decision is appropriate or not, let alone whether there is a ground of judicial review available in respect of such a decision. For example, one of the main reasons which the DEP has stated it did not take any prosecute in respect of the hazardous waste facility at Bellevue was because it considered that the company maintaining its operations was preferable to the risks of illegal dumping of waste of the accumulation of waste throughout the community (Economics and Industry Standing Committee "Bellevue Hazardous Waste Fire Inquiry" Report No 2 Volume 2 at page 30). It is arguable that such a consideration was irrelevant and therefore that the DEP's actions were amenable to judicial review. However, as the DEP was no required to publish any reasons for his decision, the matter was never able to be investigated.

The failure of the DEP/EPA to provide reasons about some of their decisions also means that some members of the public perceive that those agencies make decisions with little regard to the effect of those decisions on people's lives and in cohort with the very polluters the agency is meant to regulate. Requiring environmental agencies to publish reasons for their decisions would have far reaching benefits, including assisting agencies

[4] Volker, "Just Do It – How the Public Service Made It Work" Volume 8 *Australian Journal of Administrative Law* August 2001 at 204.

to make good decisions, enabling review of those decisions, and restoring public confidence in environmental agencies.

Providing civil remedies for criminal offences

Where a criminal penalty is prescribed for an offence, Courts generally presume that such penalty is the only remedy available. This presumption is based on the general common law principle that:

> "Where a liability not existing at common law is created by a statue which at the same time gives a special and particular remedy for enforcing it… The remedy provided by the statute must be followed."[5]

Accordingly, in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, Mason J said at 49:

> "The issue of an injunction to restrain an actual or threatened breach of criminal law is exceptional."

This principle has recently been applied in WA. His Honour Justice White noted that failure to comply with the Soil Conservation Notice attracted a criminal penalty, and held that as the *Soil and Land Conservation Act* provides an "exhaustive" code of available remedies, he was not authorised to grant an injunction[6].

Injunctions are, however, available to restrain acts which attract a criminal penalty if legislation specifically provides for such a remedy. See for example section 123 of the *Environmental Planning and Assessment Act 1979* and section 475 of the *Environmental Protection and Biodiversity Conservation Act 1999*. providing third parties with a right to bring civil proceedings in respect of offences, including proceedings for an injunction, would be an effective method of enforcing the provisions of the Act. This is particularly so when consideration is given to the fact that the DEP has instituted only 50 prosecutions since the Act came into force on 20 February 1997[7].

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[5] *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32 at 42, citing with approval Willes J in *Waterworks Company v Hawkesford* (1859) 6 CB(NS) 335.

[6] *The Commissioner of Soil and Land Conservation v Nabarlek Nominees Pty Ltd, Soiland Garden Suppliers Pty Ltd and BGC (Australia) Pty Ltd* (2002) WASC 18

[7] DEP Media Release 6 August 2002 "Environmental Watchdog wins landmark decision" at www.enviro, wa.gov.au/print.asp?id=4&catid=1&pubid=1658

Attachment 3

ISSUES PAPER ON ASPECTS OF THE Environmental Protection Amendment Bill 2002

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On 27 June 2002 the *Environmental Protection Amendment Bill 2002* ("the Bill") was introduced into State Parliament. This paper outlines the issues which arise from the changes the Bill seeks to make to the *Environmental Protection Act 1986* ("the Act") in respect of:

1. Regulating clearing throughout WA;
2. Creating an offence of "environmental harm" and amending the offence of "pollution";
3. Making directors and managers liable for the actions of their corporations;
4. Providing protection for whistleblowers;
5. Environmental Protection Policies;
6. The objects and principles of the Act; and
7. Prosecutions.

1. Clearing (Part 9 of the Bill)

The Bill proposes that the *Environmental Protection Act 1986* now governs whether and in what circumstances clearing can be carried out in Western Australia.

What is clearing?

"Clearing" is any act which causes the death, destruction, or removal of, or substantial damage to, some or all of the native vegetation in an area. It includes severing or ringbarking of trunks or stems, draining or flooding land, burning and grazing of stock[8].

"Native vegetation" means indigenous aquatic or terrestrial vegetation, but does not include vegetation in a plantation[9]. Neither does it include any vegetation that was intentionally sown, planted or propagated[10]. (The Bill provides that Regulations may declare vegetation to be "native vegetation" even it is has been intentionally sown, planted or propagated. However, no such Regulations have yet been drafted.)

Issues

- It is arguable that "native vegetation" does not include any vegetation other than remnant vegetation, as non-remnant vegetation has obviously been intentionally

[8] Section 51A *Environmental Protection Act 1986*
[9] Section 3 *Environmental Protection Act 1986*
[10] Section 51A *Environmental Protection Act 1986*

sown, planted or propagated. For example, "native vegetation" will not include vegetation which has been planted as part of a landcare or restoration activity.

What land and water is covered by clearing laws?

The *Environmental Protection Act 1986* ("the Act") applies to most areas of land in the State[11].. For example, the Act applies to rural land, urban land, Crown land, roadside vegetation, pastoral leases, land the subject of a mining lease and land the subject of public works. The only land which may not be covered is land the subject of a State Agreement entered into before 1 January 1972,[12] Commonwealth land, or land which the Minister specifically orders is not covered.

The Act applies to most areas of water in the State, including rivers, streams, wetlands, dams and all other natural and artificial watercourses and waterbodies. It also applies to coastal areas up to 3 nautical miles from the low tide mark.

When is clearing illegal?

It is illegal for any person to clear native vegetation unless that person:
1) Has a "clearing permit";
2) Has "lawful authority"; or
3) Clearing is exempted by the Regulations.

An individual may be fined up to $250,000 for clearing without a clearing permit or lawful authority, with a maximum additional fine of up to $50,000 for each day they continue to clear. A corporation may be fined up to $500,000 for clearing without a clearing permit or lawful authority with a maximum additional fine of up to $100,000 for each day they continue to clear[13].. The directors and managers of a corporation will commit and be liable for the same offence as that corporation unless they can show a specific reason why they should not be (see section 3 of this paper).

Issues

- It will be unclear exactly what clearing is covered until the Regulations are finalised.
- The current draft *Clearing Permit (Exemption) Regulations 2002* focus on providing exemptions for clearing trees, rather than all types of vegetation.
- The current draft *Clearing Permit (Exemption) Regulations 2002* provide exemptions to people who clear for the purpose of obtaining firewood and fence lines/posts.
- The current draft *Clearing Permit (Exemption) Regulations 2002* provide exemptions for clearing for firebreaks and existing tracks.

[11] The Act does not apply to areas or premises if the Minister makes an order in relation to an area or premises pursuant to section 6 of the *Environmental Protection Act 1986*.
[12] Section 5 *Environmental Protection Act 1986*
[13] Schedule 1 item 8D *Environmental Protection Act 1986*

Clearing permits

There are two types of clearing permits: area permits and purpose permits[14].. Area permits are issued for clearing on particular land and can only be issued to the owner of the land or someone acting on the owner's behalf. Area permits are valid for a maximum of 2 years[15]. Purpose permits are issued for clearing in various different areas for a particular purpose and can only be issued to the person on whose behalf the clearing will be done. Purpose permits are valid for a maximum of 5 years[16]..

Issues

- "Purpose permits" may be very broad and may, for example, be issued to Main Roads to undertake all and any roadworks, or to local governments to extract any gravel needed for local works.

Who is the application to?

All applications for clearing permits must be made to the Chief Executive Officer of the Department of Environmental Protection ("CEO"). All applications must be accompanied by management plans, maps and other information which supports the application. The CEO cannot deal with an application unless it is made in the correct form by the correct person and is accompanied by the appropriate fee and documents[17].

Who can comment on applications?

Once the CEO has received an application, the CEO must invite any public authority or person who has a "direct interest" in the subject matter of the application to comment on the application[18]. A person will probably have a "direct interest" in the clearing if they are a neighbouring or downstream landowner, or if they have private interests which will be affected by the clearing. Whether or not a person has a "direct interest" must be decided by the CEO in each individual case.

Issues

- A person will probably not have a direct interest, even if they are very concerned about the clearing, if they cannot show they will be actually affected by the clearing permit. The CEO should therefore be required to widely advertise the permit and seek submissions from any person. The CEO should then be obligated to take *all* public/government submissions into account when deciding whether to grant a clearing permit.

[14] Section 51E *Environmental Protection Act 1986*
[15] Section 51G *Environmental Protection Act 1986*
[16] Section 51G *Environmental Protection Act 1986*
[17] Section 51E *Environmental Protection Act 1986*
[18] Section 51E *Environmental Protection Act 1986*

How is the decision made?

Clearing permits can only be issued by the CEO[19].. In deciding whether to issue a permit, the CEO must:

- Take into account any comments received from those invited to comment on the application;
- Have regard to the "clearing principles"[20] (the principles are set out in schedule 5 of the Bill);
- Have regard to any relevant town planning scheme, or any strategy, policy or plan made or adopted under a scheme[21];
- Have regard to any Statement of Planning Policy[22] (for example, the *Leeuwin-Naturaliste Ridge Policy*);
- Have regard to any local planning strategy[23]; and
- Ensure that the permit is consistent with any Environmental Protection Policy[24] (for example, the E*nvironmental Protection (Gnangara Mound Crown Land) Policy 1992* and the *Environmental Protection (Swan Coastal Plain Lakes) Policy 1992*.)

After considering the above, the CEO can either refuse to grant the permit, grant the permit on conditions, or simply grant the permit. However, the CEO may only make a decision which is seriously at variance with the "clearing principles" if in the CEO's opinion there is a good reason for making that decision[25].. The CEO must publish reasons for any decision which is seriously at variance with the clearing principles[26].. In addition, the CEO must not issue a clearing permit if the associated effect on the environment would be inconsistent with and provide less protection than any Environmental Protection Policy[27].

Issues

- Consideration of the "clearing principles" alone would probably lead to a decision by the CEO never to issue a clearing permit for many areas of remnant vegetation, including most Bush Forever sites. However, in addition to having regard to the clearing principles, the CEO must also have regard to relevant planning instruments. Therefore if a town planning scheme provides that an area of remnant native vegetation is zoned urban (indicating that the vegetation will need to be cleared for development) there may be a direct conflict between the clearing principles and the town planning scheme. The resolution of this conflict, and

[19] Section 51E *Environmental Protection Act 1986*
[20] Section 51O, Schedule 5 *Environmental Protection Act 1986*
[21] Section 51O *Environmental Protection Act 1986*
[22] Section 51O *Environmental Protection Act 1986*
[23] Section 51O *Environmental Protection Act 1986*
[24] Section 51P *Environmental Protection Act 1986*
[25] Section 51O *Environmental Protection Act 1986*
[26] Section 51Q *Environmental Protection Act 1986*
[27] Section 51P *Environmental Protection Act 1986*

therefore a decision about whether the area should be cleared or not, is solely at the discretion of the CEO.

- The clearing principles may not adequately relate to all types of vegetation.
- The CEO has the power, albeit restricted, to make a decision which is at variance with the clearing principles.
- The CEO should be required to take an applicant's environmental record into account when making a decision.

Can a permit be conditional?

If the CEO decides to issue a clearing permit, the CEO may make the permit subject to any conditions which the CEO considers are necessary or convenient for controlling environmental harm or offsetting the loss of vegetation[28].. For example, the CEO can impose a condition requiring the permit holder to plant in other areas, to monitor operations, to conduct risk assessment, to enter into a conservation covenant or agreement to reserve, or to implement an environmental management system[29].. The CEO also has the power to require a person to make contributions to a fund for the purpose of establishing or maintaining vegetation. This could be used to help fund the purchase of areas for the conservation estate.

Can a permit be amended, revoked or suspended?

The CEO has the power to amend the conditions of a clearing permit once it is issued. For example, the CEO may remove any of the conditions of a permit, re-describe the boundaries of an area permit, re-describe the procedures that must be followed in a purpose permit, or extend the duration of a permit[30]. In exercising power to amend conditions, the CEO is bound to take into account the same issues as when deciding whether to grant a clearing permit[31].. However, the CEO does not have to seek comments from any third parties about the proposed amendment.

The CEO has the power to revoke or suspend a clearing permit if the permit holder has breached a permit condition, if the holder provided false or misleading information in the clearing application or if the permit holder applies to surrender the permit[32].

If the CEO intends to amend, revoke or suspend a permit, the CEO must give the permit holder at least 21 days to make representations to the CEO to show why the action should not be taken[33].

Issues

[28] Section 51H *Environmental Protection Act 1986*
[29] Section 51I *Environmental Protection Act 1986*
[30] Section 51K *Environmental Protection Act 1986*
[31] Section 51O *Environmental Protection Act 1986*
[32] Section 51L *Environmental Protection Act 1986*
[33] Section 51M *Environmental Protection Act 1986*

- The CEO should be required to seek comments from other government authorities and the public when deciding whether to amend, revoke or suspend a permit.
- The CEO should be required to take a licencee's environmental record into account when deciding whether or not to revoke, amend or suspend a permit.
- The CEO's power to amend, revoke or suspend a permit may only be exercised in particular circumstances. For example, the CEO cannot revoke or suspend a permit if new information is discovered which indicates the clearing should not be carried out. The CEO should have a broad power to amend, revoke or suspend a permit so that that power can be exercised whenever it is necessary to ensure inappropriate clearing is not carried out.

Can a permit be transferred?

The CEO has the power to transfer a clearing permit from the holder to another person if the responsibility for the activities to which the permit relates have changed[34]. In exercising power to transfer a permit, the CEO is bound to take into account the same issues as when deciding whether to grant a clearing permit[35]. However, the CEO does not have to seek comments from any third parties about the proposed transfer.

Issues

- The CEO should be required to seek comments from other government authorities and the public when deciding whether to transfer a permit.
- The CEO should be required to take a tranferee's environmental record into account when deciding whether or not to transfer a permit.

What happens if permit conditions are breached?

If the holder of a clearing permit contravenes a condition of the permit (or a condition of a conservation covenant or agreement to reserve referred to in the permit), they will commit an offence[36]. An individual may be fined up to $62,500 for this offence with a maximum additional fine of up to $12,500 per day if they continue the offence. A corporation may be fined up to $125,000 for this offence with a maximum additional fine of up to $25,000 per day if they continue the offence[37]. The directors and managers of a corporation will commit and be liable for the same offence as that corporation unless they can show a specific reason why they should not be (see section 3 of this paper).

Appeals to Minister about clearing permits

Any person who is not satisfied with the CEO's decision:

- To issue a clearing permit;

[34] Section 51N *Environmental Protection Act 1986*
[35] Section 51O *Environmental Protection Act 1986*
[36] Section 51J *Environmental Protection Act 1986*
[37] Schedule 1 item 1E *Environmental Protection Act 1986*

- About a condition of the permit;
- To transfer, amend, revoke or suspend a clearing permit,

may appeal to the Minister for the Environment in writing within 21 days of that decision[38].

The CEO's decisions have effect pending appeals to the Minister unless the decision would allow clearing in excess of what is already permitted, in which case the CEO's decision does not have effect until the appeal is determined[39].. For example, if a person appeals against the grant of a clearing permit, the permit does not have any effect until after the appeal is determined.

Issues

- If a person (other than a permit holder) appeals against an amendment to a permit, the amendment continues to have effect until the appeal is determined[40]. Therefore if the amendment permitted increased clearing, that clearing could be carried out while the appeal is being heard. This is an exception to the general rule established by the Bill that any of the CEO's decisions which permit increased clearing do not have effect pending an appeal

Record of clearing permits

The DEP must keep a record of all clearing permits, applications for clearing permits and transfers of clearing permits[41].

Issues

- The details of what will be included on the record, and how accessible it will be, depend upon the Regulations. Therefore the scope and availability of the record will be unclear until Regulations are passed.

Clearing permits and environmental impact assessment

If a proposal is the subject of an environmental impact assessment under the Act, the CEO cannot consider an application for any clearing permit associated with that proposal until the Minister for the Environment has made a decision on the proposal[42].. Any decision which the CEO makes about the clearing permit must then be in accordance with the Minister's decision.

Lawful authority

[38] Section 101A *Environmental Protection Act 1986*
[39] Section 105 *Environmental Protection Act 1986*
[40] Section 101A (3) (b) and 101A (7) *Environmental Protection Act 1986*
[41] Section 5Q *Environmental Protection Act 1986*
[42] Section 51F *Environmental Protection Act 1986*

A clearing permit is not required if clearing is carried out in accordance with another "lawful authority"[43]. "Lawful authority" includes:

- A subdivision approval;
- Approval for a building (as long as the clearing is within the building envelope);
- Implementation decisions issued by the Minister for the Environment after a proposal has been the subject of an environmental impact assessment under the Act;
- Subdivision approval or development approval issued under a scheme which has been the subject of an environmental impact assessment under the Act;
- Management of land by the Department of Conservation and Land Management in accordance with a Forest Management Plan;
- A works approval or licence issued under the Act;
- A road or production contract with the Forest Products Commission;
- Clearing under the *Bush Fires Act 1954*.

There are many other lawful authorities – see Schedule 6 of the Act.

Issues

- The "lawful authorities" may exempt some substantial clearing eg any clearing pursuant to a subdivision approval will not require a clearing permit.

Vegetation conservation notices

"Vegetation conservation notices" are notices which require a person to repair damage, re-establish vegetation or prevent erosion[44]. A vegetation conservation notice can be issued to any person by the CEO if the CEO suspects on reasonable grounds that that person has, or is likely to, clear native vegetation without a clearing permit and without a lawful authority. Before the CEO can give a person a vegetation conservation notice, the CEO must give a person a chance to make submissions as to why a notice should not be issued. A vegetation conservation notice can be registered on the title to any land, in which case it binds successive landowners.

Note that in urgent cases, a DEP officer can issue a "prevention notice" to prevent environmental harm (see "Enforcement" section of the EDO's other paper on aspects of the Bill).

Clearing injunctions

A "clearing injunction" is an order of the Supreme Court which prevents a person from being involved in illegal clearing. The CEO can apply for a "clearing injunction" from the Court if the CEO suspects that a person is involved in, or will be involved in, clearing native vegetation without a clearing permit and without a lawful authority[45].

[43] Schedule 6 *Environmental Protection Act 1986*
[44] Section 70 *Environmental Protection Act 1986*
[45] Section 51S *Environmental Protection Act 1986*

Issues

- It is unlikely that any other person, including any member of the community, can apply for a clearing injunction.
- The use (and therefore effectiveness) of "clearing injunctions" is difficult to gauge at present and will depend upon any prosecution guidelines which the DEP develops to guide the use of the DEP's new enforcement powers.

2. Creating an offence of "environmental harm" and changes to offence of "pollution" (sections 28, 29, 37 of the Bill)

The Bill proposes to make it an offence to cause "environmental harm"[46]. Environmental harm includes removal, destruction of, or damage to, native vegetation or habitat of native vegetation or terrestrial animals. It also includes the alteration of the environment to its detriment or degradation[47], and anything which is declared by the Regulations to be "environmental harm".

There are two types of environmental harm – material environmental harm and significant environmental harm. Material environmental harm is caused when the harm is not trivial or negligible, or when it would cost more than $20,000 to take all reasonable and practicable measures to prevent, control or abate the harm and to make good the resulting damage. Significant environmental harm is harm which is irreversible, high impact or on a wide scale, or harm which is significant or in an area of high conservation value/special significance, or harm in respect of which it would cost more than $100,000 to take all reasonable and practicable measures to prevent, control or abate the harm and to make good the resulting damage.

A person who causes or allows either type of environmental harm to be caused *with intent or criminal negligence* commits an offence. The maximum penalty for causing serious environmental harm with intent or criminal negligence is $1,000,000 for a corporation and $500,000 for an individual[48].

In addition, even where there is no evidence of environmental harm or criminal negligence, any person who causes or allows either type of environmental harm to be caused also commits an offence. The maximum penalty for causing serious environmental harm with is $500,000 for a corporation and $250,000 for an individual[49].

Issues

- It is not "environmental harm" to damage aquatic animals.

Definition of pollution

[46] Section 50A, 50B *Environmental Protection Act 1986*
[47] Section 3A *Environmental Protection Act 1986*
[48] Schedule 1 *Environmental Protection Act 1986*
[49] Schedule 1 *Environmental Protection Act 1986*

The definition of "pollution" in the Act has also be modified. Pollution must now involve an actual emission. An emission is a discharge into air or water, an emission of noise, odour or electromagnetic radiation, or transmission of electromagnetic radiation[50].

Issues

- Does the definition of "emission" include all types of pollution?

Defences (Section 55 of the Bill)

A person has a defence to causing pollution or environmental harm if they can show that that the pollution or environmental harm was caused in accordance with an implementation decision, clearing permit, works approval, licence etc[51].

A person also has a defence to causing environmental harm (but not pollution) if they can show that the harm resulted from an authorised act which did not contravene any other law[52].. This exemption applies, for example, to any acts done by a public authority in pursuance of its statutory functions, and to any of the activities listed in Schedule 6 (Schedule 6 provides a list of activities which may be carried out without a clearing permit.)

The defences which currently exist in respect of causing pollution will also apply to causing environmental harm[53]. For example, it is a defence if the environmental harm was necessary to prevent irreversible damage to significant portion of environment or prevent danger to human health/life, or that it was due to an accident caused otherwise than by negligence.

Issues

- Statutory authorities will have a defence to causing environmental harm if they can show that the harm was done in the exercise of a function conferred on them by another law. For example, local governments will have a defence to any activity which they carry out which provides for the good government of persons in their district.. This will provide a very broad defence to many activities carried out by many government agencies.
- Section 74B (2) (g) refers to sections 51C and 51A of the Act – but these sections do not exist.

3. Directors' Liability (section 131 of the Bill)

[50] Section 3 *Environmental Protection Act 1986*
[51] Section 74A *Environmental Protection Act 1986*
[52] Section 74B *Environmental Protection Act 1986*
[53] Section 74 *Environmental Protection Act 1986*

The Bill provides that if a corporation commits an offence, each director of the corporation plus all people who are concerned in the management of the corporation are also taken to have committed the offence unless they can prove that:

1) they did not know, and could not reasonably have been expected to know, that the offence was being committed;
2) they couldn't influence the corporation; or
3) they used all due diligence to prevent the offence[54].

4. Whistleblowers (section 128 of the Bill)

The Bill provides that it is an offence to prejudice the safety or career of, or intimidate or harass, any person because they have or will furnish information for the purpose of an investigation under the Act or which tends to show that another person is involved in the commission of an offence under the Act[55]. The maximum penalty for this offence is $125,000 for corporations with a continuing penalty of $25,000 per day and $62,500 for individuals with a continuing penalty of $12,500.

5. Environmental Protection Policies (Part 6 of the Bill)

The Act currently provides that it prevails over any other inconsistent State law. The Bill proposes that Environmental Protection Policies (as well as the Act generally) will prevail over any other State law[56].. The Bill also proposes the following changes in respect of Environmental Protection Policies (EPPs):

- EPPs will now apply to whole of the State unless otherwise stated;
- The EPA must publish reasons for any revision of any draft EPPs;
- The Minister must consult public authorities and persons affected by a draft EPP unless the draft EPP is substantially the same as the draft advertised by the EPA and the EPA has already consulted such bodies;
- EPPs will now remain in force while they are being reviewed; and
- Regulations may be made to prescribe methods for evaluating the effectiveness of EPPs, the application and enforcement of EPPs and prescribing implementation standards and criteria in EPPs.

The Bill also proposes to increase the penalties specified in several existing EPPs so that the maximum penalty is $125,000 for a corporation and $62,500 for an individual.

Issues

[54] Section 118 *Environmental Protection Act 1986*
[55] Section 111A *Environmental Protection Act 1986*
[56] Section 5 *Environmental Protection Act 1986*

- The Minister will not have to consult with the public in respect of EPPs if the EPA has already carried out similar consultation.

6. Objects and Principles (section 121 of the Act)

The Bill proposes to insert a provision in the Act stating that:

> "The object of this Act is to protect the environment of the State, having regard to the following principles:
>
> The precautionary principle;
> The principle of intergenerational equity;
> The principle of the conservation of biological diversity and ecological integrity;
> Principles relating to improved valuation, pricing and incentive mechanisms
> The principle of waste minimization"[57]

Issues

- No decision makers under the Act are required to take any of the above objects into account when making their decisions. The objects will therefore generally direct actions and policy, but it will be difficult to review any decision maker's decision under the Act on the basis that their decision is contrary to one of the objects. This could make the objects of relatively marginal utility.

7. Prosecutions (sections 129, 130, 131, 132)

The Act currently provides that the CEO cannot bring proceedings for a tier 1 or 2 offence under the Act without the consent of the Minister. The Bill proposes that the consent of the Minister no longer be required. That is, the CEO alone will have the discretion whether to commence proceedings for a prosecution[58]. The Bill also proposes that proceedings in respect of 1)failing to comply with a noise abatement direction, 2) failing to provide a name and address in relation to a noise abatement direction, 3) failing to assist an authorised person and 4) delaying or obstructing an authorised person may be brought by a police officer or the CEO of a local government with the consent of the CEO of the DEP.

Currently all proceedings for offences under the Act must be brought within 2 years of the offence occurring. The Bill proposes to amend the Act so that proceedings for tier 1 offences (the most serious offences) can be brought at any time[59]. It further proposes that proceedings for any other offence must be brought within 2 years of either:

1) the time when the matter of complaint arose; or

[57] Section 4A *Environmental Protection Act 1986*
[58] Section 114 *Environmental Protection Act 1986*
[59] Section 114A *Environmental Protection Act 1986*

2) the day on which evidence of the alleged offence first came t the attention of a person entitled to bring a prosecution.

The Act currently provides that no authorised person under the Act is personally liable for their actions[60]. The Bill proposes to repeal this general indemnity, but still provides that an action in tort will not lie against any authorised person who does anything in good faith under the Act[61].

Issues

- The Bill does not specify whether proceedings for offences (other than tier 1 offences) must be brought within 2 years of the *later* of the matters set out above. It is therefore arguable that the proceeding must be brought within the earlier of those matter. This means that proceedings will always need to be brought within 2 years of the date of the offence - regardless of when any authorised person became aware of that offence.

[60] Section 121 *Environmental Protection Act 1986*
[61] Section 121 *Environmental Protection Act 1986*

Attachment 4

‘Consultation paper on the proposed BC Act’

Attachment 5

SUBMISSION BY THE CONSERVATION COUNCIL OF WA IN RESPONSE TO THE CONSULTATION PAPER ON THE PROPOSED BIODIVERSITY CONSERVATION ACT

March 2003

Attachment 6

Government of Western Australia

Media Statement

The Hon. Judy Edwards MLA

Minister for the Environment and Heritage

Statement Released: 26-Jun-2002

Portfolio: Environment and Heritage

Major reforms to Environmental Protection Act introduce tough new penalties

26/6/02

A tough new offence of environmental harm, new penalties and controls to stamp out illegal clearing and improved environmental regulation will be established under major reforms to the Environmental Protection Act announced by the State Government today.

The new offence of environmental harm will extend current prosecution powers, creating a new penalty to cover all acts of environmental vandalism.

Individuals intentionally causing serious environmental harm face penalties up to $500,000 or five years in jail, while for companies the penalty is up to $1million.

The new penalties will also target acts of illegal clearing, which currently apply maximum fines of only $3,000 for individuals in rural areas. Under the new provisions, clearing without a permit can attract a $250,000 fine.

Daily penalties also apply to those who continue to commit an offence - with one fifth of the maximum penalty applicable each day until the offence stops.

Environment and Heritage Minister Dr Judy Edwards said the changes were in line with the Government's commitment to strengthen environment regulation across the State.

"For eight years, the Court Government simply turned a blind eye to ongoing environmental problems - highlighted by its inability to tackle illegal clearing," Dr Edwards said.

"The tough, new penalties not only send a very strong message to the community that illegal clearing is unacceptable, but they also reflect the devastating impact that clearing has on biodiversity and its contribution to land degradation, including salinity.

"Most importantly, the new offence of environmental harm will arm Government with new prosecution powers, tackling other cases of environmental degradation which did not fall under the current narrow offence of pollution."

Other reforms to the act include:

- forcing illegal land clearers to re-establish vegetation;
- enabling the Department of Environmental Protection to stop industry discharges on-site before they start affecting the environment outside;
- removal of the Minister's permission for prosecution action;

- enabling the Government to require licence-holders to ensure funds are available to deal with potential problems sites; and

- new whistleblower protection for people revealing environmental problems.

"The Bill contains a special provision to stop people from unauthorised clearing while Parliament is debating the Bill," Dr Edwards said.

"From today, if anyone clears without proper authorisation, they can be ordered to re-establish the vegetation, and that can be a very expensive exercise.

"The DEP has established a hotline so that people can be sure of the new rules and avoid having to replant. The provisions will also be advertised State-wide in the media."

Dr Edwards said a new land-clearing approval process would also be established to replace the current system of assessment under the *Soil and Land Conservation Act* and by the Environmental Protection Authority.

"The new clearing permit process deals with all environmental impacts, not just soil degradation, and it is quicker and simpler than the EPA's assessment process," she said.

"Only the most significant clearing proposals will now have to be dealt with by the EPA."

There are exemptions for a clearing permit, where clearing has been specifically approved under other Acts.

Under regulations a range of limited, specific exemptions would be allowed, including clearing for buildings, cutting fire breaks and firewood.

Dr Edwards said anyone who planned to clear and was in any doubt should contact the DEP on free-call number 1800 061 025.

Minister's office: 9220 5050

Attachment 7

Government of Western Australia

Media Statement

The Hon. Judy Edwards MLA

Minister for the Environment and Heritage

Statement Released: 6-Nov-2002

Portfolio: Environment and Heritage

Amendments to Environmental Protection Act pass first stage

6/11/02

The most significant changes to Western Australia's environmental laws for more than a decade have passed their first hurdle, with amendments to the Environmental Protection Act passing the Legislative Assembly late last night.

The amendments will establish a tough new offence of environmental harm, which will extend current prosecution powers to cover all acts of environmental vandalism.

Individuals intentionally causing serious environmental harm face penalties up to $500,000 or five years in jail, while for companies the penalty is up to $1million.

Environment Minister Judy Edwards said the new legislation had moved quickly through the assembly, despite the number of changes proposed.

"This was possible because the Government referred the amendments to a legislative committee for examination, rather than whole Lower House," she said.

"Contrary to some critics' claims, this was not a delaying tactic.

"Rather, it actually enabled a far more detailed, efficient and speedier investigation of the Bill, with the committee taking a total of just 12 hours to complete its review."

Dr Edwards thanked all members who participated in the committee and their constructive role in examining the Bill.

Minister's office: 9220 5050

Attachment 8

ACF 2002, *Rights & Responsibilities in Land & Water Management*, Discussion Paper, July.

Attachment 9

Some thoughts on the concept of compensating people when we prevent them from acting irresponsibly

Background

The concept of payments for landholders affected by clearing controls has been a long standing issue. Some landholders whose properties were subject to clearing controls more than 10 years ago still contact AGWEST seeking compensation. Similarly, there are landholders with no intention of clearing their land who want to submit a clearing Notice of Intention in case it makes them eligible for compensation.

There have been a number of options considered since 1986, when controls were first introduced under the Soil and Land Conservation Act. While it is generally accepted that there is a need to financially assist landholders with large areas of bushland, the case for a major compensation program has not been accepted.

A compensation based approach

A compensation based approach would provide landholders prevented from clearing land with a payment for loss of the "right to clear". A current expectation is that such a payment would be equivalent to the loss suffered by the landholder, based on either the decline in property value or diminished returns to the farming enterprise. Such an approach is seen as suffering from a number of significant failings.

Inequities

To be equitable any compensation program would need to include all landholders with substantial bush areas on their property. It would be inequitable to provide assistance packages for landholders prevented from clearing in recent years without also providing similar packages to those who voluntarily stopped clearing their properties many years ago, when the problems of salinity and biodiversity loss first became apparent.

Legal precedent

There is no constitutional right to compensation in WA where the use of land is restricted, even where that restriction may effectively prevent any productive use of the land.

Some rights have been established by statute. For example, the Land Administration Act (1997) provides that compensation is payable where land is "taken" for a "public work", such as a road widening, or damaged by entry (such as trucks servicing a power line) or from which material is removed (such as gravel)[62]. The Wildlife Conservation Act also contains provision for compensation where the occurrence of rare flora on someone's land has caused loss of use or enjoyment of their land.[63]

Under the Soil and Land Conservation Act the Commissioner can only object to clearing when the objection is necessary to prevent land degradation, either on-site or affecting downstream properties. This is the fundamental difference between this Act and those where compensation is included. It has been expressed as:

> *when government acts to secure rights – when, for example, it stops someone from polluting his neighbour's land – it is acting under its police powers and no compensation is due to the owner, whatever his (sic) financial loss, because the*

[62] Land Administration Act 1997, Part 9 and Part 10.
[63] Wildlife Conservation Act 1950, Section 23.

> *use – pollution – was wrong in the first place. Since there is no right to pollute, we do not have to pay polluters not to pollute*[64]

The downstream degradation caused by clearing is legally comparable to "pollution", even though this word is normally used in an industrial context. For this reason there is no right to compensation under the Soil and Land Conservation Act.

Acceptance by Government that farmers did have a right to cause land degradation, and that Government needed to provide compensation when it took this right away, would establish a major precedent. This would strengthen the view held by some farmers that they do have a right to cause degradation, undermining progress towards sustainable agriculture. Additionally, other industries wanting to develop land, such as for a steel mill or chemical plant, could also seek compensation when prevented from conducting or continuing environmentally unacceptable activities. While many of these have their proposals assessed through separate EPA processes, the Commissioner does receive and assess land-clearing proposals from a number of high value industries, such as quarrying and horticulture.

If the compensation payment was restricted to agricultural interests alone, it could be seen to represent an unfair subsidy to agriculture. As a number of NOI's for clearing are received from large corporate farmers, public perception of the inequities involved would reflect poorly on the agricultural sector as a whole.

Cost effectiveness

A program that included compensation payments could raise unrealistic financial expectations, would encourage landholders who had no intention of clearing to apply for compensation, and be fraught with administrative complexities. If the formula for payment is based on "rights" then there will continue to be dispute over the scale of payment.

Straight compensation also restricts the ability to gain maximum value from funds used. The main example in Western Australia is the compensation payments made to those farmers prevented from clearing in the six controlled Water Supply Catchments of the South-West.

In 1976 and 1978 clearing restrictions were placed over these catchments as clearing for agriculture was causing a rapid increase in the salinity of previously fresh rivers. To date some 372 compensation claims have been settled for a total of $36.36 million.[65] An additional $16.25 million has been spent on property purchase and reforestation. Government still has an exposure of an additional over $10 million if all eligible landholders apply.

Much of the intent behind the payments was to alleviate the serious financial and social problems faced by many farmers, particularly for those whose properties were in an early stage of development. However, because the money was paid as compensation for removal of the right to clear, most of the land remained with the owners and many areas are still deteriorating. There was not any requirement for management agreements or for landholders to fence stock out of areas they received compensation for, except where this has been part of subsequent agreements on the use of the land, such as for the logging of mature trees.

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[64] Nahan, M. (1999) Property rights and regulatory takings. In *Taking property rights seriously*; papers from the Pastoralists and Graziers Association Property Rights Conference 25th June 1999. Pages 8-9.

[65] Figures supplied by George Kikiros, Water and Rivers Commission, 28 September 1999.

As a consequence, little property adjustment or improvement in land management measures followed payment of compensation. The Water and Rivers Commission is now undertaking a substantial financial incentive program aimed at preventing continuing and serious degradation of the bushland involved. Additionally, there is some ongoing clearing pressure from landholders who have already been compensated, or whose parents have.

In summary, this program has been very expensive per hectare protected and failed to address long term management costs and needs.

Estimating extent of loss suffered

If a straight compensation program was to be introduced it would require a formula for estimating the payments to be made. A number of proposed formulae have been developed over the years. When based on a the assumption that government has removed a landholder's right to use land in a manner of their choosing, these are all are fraught with difficulty. The variables that need to be considered include:

- value of the enterprise government has prevented the establishment of will vary enormously;
- budget analysis for a umber of areas shows that it costs more to clear land than to purchase cleared and developed land; and
- in a number of areas the bushland now has a higher market value than cleared land.

The most equitable way of estimating compensation payments is through valuations based on changes to the market value of the land, which represents the true loss to the landholder. Unimproved market value was, in effect, the method used to estimate payments in the controlled catchments. A Natural Resources Adjustment Scheme established in 1997 for landholders affected by clearing controls (now being wound up) was based on payments equal to the difference between the estimated value of the land before and after clearing controls were applied. However, this often left the landholder with a minimal payment, because the value of the land had not changed much and in some cases the property did not readily sell (market price, as established by the Valuer General, does not necessarily mean the property will sell readily)

The most effective compensation program, holding minimal inequities, would be one based on payments that reflected the total market price, or the price of purchasing equivalent land. This being the case, such a scheme would be best run as an adjustment program, not a compensation one. The end result is similar, but the legal minefields are avoided.

Scale

There is approximately 2.4 million hectares of bushland on farms in the agricultural areas of Western Australia. A compensation program for removal of a "right to clear" would involve a very large number of landholders, unless it was specifically designed to exclude many claims. In which case it would be seen as inequitable.

Experience with similar schemes, as outlined above, suggests that most land holders with a large area of bush land would apply even where they had previously had no intention of clearing.

An assistance and adjustment based approach

While the option of straight compensation payments has significant disadvantages, there is a need to provide greater assistance to those who have a large percentage of their farm under bush. Assistance and adjustment schemes can assist landholders with the financial costs of change that flow from clearing controls and other environmental or economic pressures, provide additional incentives, and avoid the legal and attitudinal problems implications of a compensation scheme. Such schemes are based on need not right and provide multiple private and public benefits. The

packages can be designed to also address other adjustment needs, including decline of economic viability and loss of land to salinity.

The Native Vegetation Working Group examined the range of compensation, assistance and adjustment options available. They concluded that:

> *There is a divergence of views within the community on the appropriateness of compensation for bushland protection, and of individual rights to such compensation. While a long and protracted debate will no doubt continue on this issue, the Working Group has concentrated its efforts on the urgent development of mechanisms which provide a level of fairness and for which there is a high level of community support.*

The Working Group set out a range of mechanisms to assist landholders. These were developed on the basis that:

- benefits should be equally available to all landholders needing them, regardless of intention to clear land;
- a wide range of options is needed for landholders to draw from;
- many landholders could resolve their economic needs through the market place, and this process should not be undermined or distorted by government schemes; and
- a "safety net" scheme was needed for those landholders requiring further assistance.

The intent was to provide equivalent levels of assistance to that provided by the more expensive compensation option, but to provide this in a very targeted manner so that it addresses the real needs and provided multiple benefits. This approach is still supported. The Working Group also explored a wider range of mechanisms than those they specifically recommended, including organised catchment scale land adjustment schemes. They supported the concept of sub catchment based restructure programs developed by landholders, and see a role for government in supporting their development.

The Working Group also saw a need for information on structural adjustment and land purchase concepts to be collated and available to regional and catchment groups in order to stimulate discussion on their possible application in agricultural areas. It is unfortunate that both the State and Federal Governments dismantled their existing Rural Adjustment Schemes when the possible use of these schemes in assisting agriculture adjust to newly emerged environmental constraints, while also securing public benefits through bushland retention and management, was being identified.

Many of the Native Vegetation Working Group recommendations are only partially implemented, particularly the "safety net" which was to be provided through a Special Assistance Process. One measure that is being implemented, the revolving fund, provides for a very small measure of voluntary adjustment, through purchase of properties ("willing seller-willing buyer" basis) and the subsequent re-selling of them with conservation controls in place. This mode of operation satisfies the landholder, by providing a fair market based price for the land. It could be readily expanded to embrace broader adjustment needs.

A further development has been the release of the Commonwealth's *National Action Plan for Salinity and Water Quality*. This plan has potential to contribute an additional $150 million to land management in Western Australia, but with

> *"any Commonwealth investment in catchment/region plans will be contingent upon land clearing being prohibited in areas where it would lead to unacceptable land or water degradation;*

The Commonwealth wants to see "the harder adjustment and property amalgamation issues" addressed, and "is prepared to consider a contribution towards appropriate compensation to promote adjustment."

Conclusion

The compensation option is not viable for a number of reasons, including legal principle, cost and effectiveness. However, continuing speculation about compensation is undermining equitable approaches to the real needs of landholders.

Assistance and adjustment options need to be brought on stream much faster than is presently occurring, and at a larger scale than currently proposed. These should involve facilitation of voluntary land trading where it provides needed funds to landholders and protection and management of valuable bushland.

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