



Overview

The Environmental
Protection Act 1986





Overview

Objects and Principles

- › Precautionary principle
- › Intergenerational equity
- › Conservation of Biological Diversity and Ecological Integrity
- › Improved valuation, pricing and incentive mechanisms
- › Waste minimisation



Environmental Impact Assessment (EIA) - Overview

- EPA now has specific power to refuse referrals
- Strategic assessment available
- EPA can require further information from any person
- EPA retains power to issue informal advice/recommendations, but advice/recommendations are not binding and needn't be taken into account
- EPA now has specific power to take other decision-makers' potential decisions into account
- It is now an offence to implement a proposal before EIA decision



EIA – Referrals

- EPA has restricted power to call in proposals under an assessed scheme
- Strategic proposals can only be referred by the proponent
- Proposals may now be re-referred to the EPA if prior assessment was terminated



EIA – Refusal to accept referrals

- EPA now has specific power to refuse to accept referrals if there is “some good reason” for so refusing
- EPA must refuse to accept some referrals
- EPA’s decision to refuse referral is appealable



EIA – Further Information

- EPA can require further information in deciding:
 - ∅ Whether to accept a referral;
 - ∅ Whether to assess a proposal;
 - ∅ Whether a proposal is a “derived proposal”; or
 - ∅ The level of assessment to which a proposal should be subjected to.



EIA – Decision to assess

- EPA must make its decision to assess a proposal based on referral and requested information only
- EPA must commence assessment as soon as practicable
- EPA retains power to provide informal advice and recommendations – but advice not binding and need not be taken into account



EIA – Strategic Proposals

- Future proposals which may, if implemented, have a significant effect on the environment
- Can only be referred to the EPA by the proponent
- Assessment procedure same as for significant proposals, but it is not an offence for other decision-maker to give approval before Minister's decision



EIA – Derived proposals

- Proposal derived from strategic proposal
- EPA decides whether strategic proposal adequately assessed environmental issues, whether new information, or whether significant change to environment
- EPA's decision is appealable to Minister



EIA – Ministerial oversight

- Minister retains power to direct some EPA decisions
- Minister does not have power to direct EPA to accept a referral
- Minister specifically prohibited from directing the EPA to re-assess a proposal once it is implemented



EIA – termination/suspension

- EPA has specific power to terminate/suspend assessment if:
 - ∅ proponent agrees
 - ∅ proponent fails to take action
 - ∅ other decision-making body refuses approval



EIA - Amendments to proposal

- Proponent can amend proposal during assessment period with EPA approval
- Minister can approve minor changes to implementation conditions
- Minister can direct EPA to inquire into changes to implementation conditions
- Minister can only require re-assessment with consent of other decision makers



EIA - EPA's report and recommendations

- EPA has new broad power to make investigations into proposal
- EPA no longer bound by 6 week time frame in which to provide report and recommendations
- EPA may report on potential decisions of other decision-making bodies



EIA - Offences

- It is now an offence to implement proposal before the Minister for Environment has made a decision
- It is still not an offence to implement a proposal while the EPA is considering whether to accept referral or assess proposal



EIA - Monitoring

- EPA now has specific power to monitor all implementation conditions
- EPA may require proponent to provide information about implementation of proposal



EIA – Other

- EPA members' potential for conflict of interest remains
- No specific power to assess health impacts of proposals

Environmental Harm

New Offences (SHE, MEH)

Intentionally/criminally negligent or without intention

- ‘ Causing SEH
- ‘ Causing MEH
- ‘ Pollution (cause/allow)
- ‘ Unreasonable emission
- ‘ Discharge waste
- ‘ Unauthorised clearing
- ‘ Clearing in breach of conditions
- ‘ Whistleblower protection

Environmental Harm/2

Environmental harm (SEH or MEH)

Direct or indirect:

- ‘ Harm to E. involving
 - ‘ Removal
 - ‘ Destruction of
 - ‘ Damage to:
 - ‘ Native vegetation
 - ‘ Habitat of native vegetation, indigenous aquatic vegetation or terrestrial animals
- ‘ alteration of E to its detriment or degradation or potential detriment or degradation
- ‘ alteration of E to detriment or potential detriment of an environmental value
- ‘ alteration to E of prescribed kind

Environmental Harm/3

Material environmental harm (MEH)

- ‘ Neither trivial nor negligible
- ‘ or
- ‘ Results in actual or potential loss, property damage or damage costs

Environmental Harm/4

Serious Environmental Harm (SEH)

- ‘ **Is irreversible**
- ‘ **High impact**
- ‘ **Wide scale**
- ‘ **Is significant**
- ‘ **In high conservation value area**
- ‘ **Area of special significance**
- ‘ **Actual or potential loss**
- ‘ **Property damage**
- ‘ **Damage Costs = X 5 threshold**

Environmental Harm/5

Damage costs

Reasonable costs/expenses to prevent /control/abate EH and make good

Threshold amount

\$20,000 or greater as prescribed in regulation

Environmental Harm/6

Pollution

I

Indirect or direct alteration of the environment to its:

- ‘ Detriment/degradation
- ‘ Detriment of environmental value
- ‘ Of prescribed kind



Offences and Penalties

OFFENCE

Intentional or Criminally Negligent

SEH Individual \$500,000 /5 years gaol

Corporate Body \$1,000,000

MEH Individual \$250,000 /3 years gaol

Corporate Body \$500,00

Clearing without permit/No intention required

Individual \$125,000

Corporate Body \$500,000

Breaching CP conditions/No intention required

Individual \$62,500

Corporate Body \$125,000



Offences and Penalties/2

Three tiers of offences

- › Schedule 1 of EP Act identifies each offence provision under each particular tier
- › Tier 1 contains the highest penalties and includes imprisonment
- › Directors and managers of body corporate also commit offences



Offences and Penalties/3

Tier 1

- › Declared in Part 1 of Schedule 1 or EPP
- › Only CEO can authorise prosecution but does not need Ministerial consent
- › Complaint can be made at any time (no limitation period)
- › Up to \$500,000 and 5 years imprisonment for individuals with daily penalty of \$100,00 (serious environmental harm; or criminally negligent or intentional pollution)
- › Up to \$1,000,000 for corporate bodies with daily penalty of \$200,000



Offences and Penalties/4

Tier 2

- › Declared in Part 2 of Schedule 1 or EPP
- › Only CEO can authorise prosecution but does not need Ministerial consent
- › Modified penalty notice; or
- › Complaint may be within 24 months of:
 - › Offence; or
 - › When offence first came to notice
- › Minister cannot direct option



Offences and Penalties/5

Tier 3

- › Infringement Notice Offences or offence prescribed by regulations
- › Declared in Part 3 of Schedule 1 or EPP
- › Complaint may be within 24 months of:
 - › Offence; or
 - › when offence first came to notice
- › Authorised by CEO; or
- › Person authorised by CEO.



Offences and Penalties/6

Prosecutions for

- › Failing to comply with a noise abatement direction
- › Failing to provide a name and address in relation to a noise abatement direction
- › Failing to assist an authorised person
- › Delaying or obstructing an authorised person

may be made with the consent of the CEO by

- › CEO of local government; or
- › Police Officer.



Offences and Penalties/7

Reverse burden of proof

To avoid individual responsibility company directors and managers must establish that:

- › they did not or could not reasonably have been expected to know of offence;
- › could not have influenced outcome; or
- › have a defence



Offences and Penalties/8

General indemnity provisions repealed

Crown and servants and agents liable unless action or omission done in good faith in performance of EP Act functions



Offences and Penalties/9

Whistleblowers

Offence to:

Prejudice safety or career of; intimidate or harrass; take detrimental action against another person or threaten any of these,

Because the other person:

has, is or will furnish information.

Detrimental action = cause, comprise, involve damage or loss, discrimination, disadvantage career, profession, employment, trade or business; or reprisal



Defences

Pollution, emission or environmental harm:

- œ Prevent danger to human health/life
- œ Prevent irreversible damage to significant part of environment
- œ Accident not negligence
- œ Mitigation and notification as soon as possible

21 days after service of advised of offence to advise CEO of defence if want to rely on above



Defences/2

Tier 1

- œ Took reasonable precautions
- œ Due diligence to prevent offence
- œ Early notification of CEO



Defences/3

Under authority & in accordance with:

- › Proposal and implementation agreement
- › Prescribed standard
- › Works approval
- › Licence
- › Requirement of CN, EPN, VCN or PN
- › Approved policy
- › Declaration that EP Act or EPP does not apply
- › Exemptions(emergencies
- › Regulations
- › Exercise of power under EP Act



Defences/4

For SEH or MEH if act does not contravene any other written law and if:

- › Authorised under other written law
- › Public function under other written law
- › Agricultural practice according to Code of Practice
- › Agricultural practice Order
- › Plantation harvesting according to Code of Practice
- › Notice of Intention if no SCN
- › Schedule 6 act
- › Clearing is of a prescribed kind (*regs*) and not in an *environmentally sensitive area*
- › Servicing anti – emission devices

Licensing - procedures

- › DEP must keep records of licences
 - › DEP can't issue works approval/licences which are inconsistent with implementation conditions
 - › Occupier must obtain works approval to alter nature or volume of emissions from premises
 - › Still no real opportunity for public involvement
-

Licensing – amendment/ revocation/ suspension

- › DEP can amend, revoke or suspend works approvals and licences in very specific circumstances only
 - › DEP now has wide discretion to impose conditions of works approvals/licences
-

Enforcement

- ‘ Environmental Protection Notice
- ‘ Closure Notice
- ‘ Prevention Notice
- ‘ Vegetation Conservation Notice
- ‘ Repeal of Pollution Abatement Notice

Enforcement - EPNs

- ‘ Environmental Protection Notices
- ‘ CEO may issue EPN if suspect on reasonable grounds there is or is likely to be an offence under the Act
- ‘ CEO must give 21 days notice to show cause why notice should not be issued
- ‘ EPN may be registered on land

Enforcement – Closure Notice

- ‘ CEO may issue if consider on reasonable grounds that ongoing management of site will be required for authorised premises once authorisation expires
- ‘ CEO must give 21 days notice to show cause why notice should not be issued
- ‘ Can be registered on land

Enforcement – Prevention Notice

- ‘ DEP officer who reasonably suspects offence may issue
- ‘ No notice required, no opportunity to show why notice should not be complied with

Enforcement - Other

- ‘ Inspectors may carry out protection works and recover costs
- ‘ New tort – damage caused by breach of enforcement notices
- ‘ Any person aggrieved by enforcement notice may appeal to Minister within 21 days
- ‘ DEP must keep record of notices



Clearing Regs

DRAFT (CLEARING PERMIT EXEMPTIONS) REGULATIONS 2002

**Clearing native vegetation is not an
offence if**

clearing:

- Site for lawful building
- Within 20 metres of a dwelling
- NV is \leq 2 metres and poses risk
- Conducted according to approved Code of Practice



Clearing Regs/2

For Firewood if:

- Use by owner for heating or cooking
- Not more than 4 tonnes (4,000 kgs)
- Not ≥ 200 mm at 300mm from the base
- Does not kill or prevent regrowth

For Fence Posts:

- For maintenance
- Used on land taken from
- Not ≥ 200 mm diameter at 300mm from base
- Does not kill or prevent regrowth



Clearing Regs/3

For Fence Line:

- Up to 5 metres width
- To access fence

For Existing Access Tracks:

- Up to 5 metres wide
- For vehicles

For Existing Walking Track:

- Up to 1 metre wide
- If in use



Clearing Regs/4

For Specimen or Seed Propagation:

- If no substantial damage to plant

For Regrowth Maintenance:

- Was cultivated within 5 years before proposed clearing
- Necessary to maintain land for cultivation as used in past 5 years
- Only cultivated vegetation
- Stem diameter (at lowest point of stem near ground level) 150mm or less



Clearing Regs/5

For Fire Breaks:

- Up to 5 metres wide
- Not on road reserves

Picking wildflowers on private land:

- By owner
- Another person with owner's permission
- Does not kill
- Does not prevent regrowth

Salvage Material:

- Before permitted or exempted clearing



Financial Assurances

- ÿ Minister or CEO (with Minister's approval) can require a financial assurance as part of implementation conditions, licence, works approval clearing permit or enforcement notice
- ÿ Can require a bank guarantee, bond, insurance policy
- ÿ Condition can be appealed/amended as part of usual process

[Codes of Practice]

- › CEO may issue Code of Practice for activities which involve emission or environmental harm
- › Codes of Practice not binding



Appeals Convenor

- › Formal statutory basis of Appeals Convenor
- › Has all the powers of an Appeals Committee
- › Administers initial stages of appeal
- › Maximum term of 5 years

Bilateral Agreements

- ‘ Specific statutory power for EPA to have regard to bilateral agreement under *Environmental Protection and Biodiversity Conservation Act 1999* (Cth)
- ‘ EPA has power to require proponent to prepare assessment in a way which satisfies bilateral agreement



EPPs

ENVIRONMENTAL PROTECTION POLICIES (EPPs) (enforceable like regulations)

- EP Act and EPPS prevail over other written laws
- EPP applies to whole of State unless otherwise stated
- Draft EPP revised after public consultation > reasons in report to Minister
- Minister considers draft EPP and Report, consults public authorities and *likely to be affected persons* (as determined by Minister)
- Minister appoints committee of inquiry unless substantially same as advertised and EPA has consulted
- EPP remains in force while reviewed



EPPs/2

- In addition to 37 Schedule 2 matters for which EP Regulations can be made are added:
 - ID application area of EPP
 - Supplementing existing EPPs,
 - ID evaluation mechanisms
 - ID consultative process under certain Schedule 2 matters including application and enforcement, prescribing implementation standards and criteria, application area, supplementing EPPs, evaluating
- Penalty provisions in existing EPPs varied



Other Issues

- › No board of approved consultants or auditors
- › No civil remedies for criminal offences
- › No general requirement for reasons for decisions to be made



Other issues (cont)

“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” (Volker)



Miscellaneous Amendments

- **Increased powers regarding seizure of noisy equipment and disabling vehicle alarms**
- **Increased regulation making powers for:**
 - Specifying minimum and maximum permissible concentrations
 - Prohibit/regulate manufacture, sale, distribution, operation any substance or class of substance