

**ISSUES PAPER ON ASPECTS OF THE
ENVIRONMENTAL PROTECTION AMENDMENT BILL 2002 (WA)**

Environmental Defender's Office WA (Inc), July 2002

On 27 June 2002 the *Environmental Protection Amendment Bill 2002 (WA)* ("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 (WA)* ("the Act") in respect of:

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1. Clearing (Part 9 of the Bill)

The Bill proposes that the *Environmental Protection Act 1986* (WA) 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 stock¹.

“Native vegetation” means indigenous aquatic or terrestrial vegetation, but does not include vegetation in a plantation². Neither does it include any vegetation that was intentionally sown, planted or propagated³. (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 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 State⁴. 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 1972,⁵ 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 Section 51A *Environmental Protection Act 1986*

² Section 3 *Environmental Protection Act 1986*

³ Section 51A *Environmental Protection Act 1986*

⁴ 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*.

⁵ Section 5 *Environmental Protection Act 1986*

- 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 clear⁶. 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.

Clearing permits

There are two types of clearing permits: area permits and purpose permits⁷. 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 years⁸. 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 years⁹.

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?

⁶ Schedule 1 item 8D *Environmental Protection Act 1986*

⁷ Section 51E *Environmental Protection Act 1986*

⁸ Section 51G *Environmental Protection Act 1986*

⁹ Section 51G *Environmental Protection Act 1986*

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 documents¹⁰.

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 application¹¹. 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.

How is the decision made?

Clearing permits can only be issued by the CEO¹². 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”¹³ (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 scheme¹⁴;
- ∄ Have regard to any Statement of Planning Policy¹⁵ (for example, the *Leeuwin-Naturaliste Ridge Policy*);
- ∄ Have regard to any local planning strategy¹⁶; and
- ∄ Ensure that the permit is consistent with any Environmental Protection Policy¹⁷ (for example, the *Environmental Protection (Gnangara Mound Crown Land)*)

¹⁰ Section 51E *Environmental Protection Act 1986*

¹¹ Section 51E *Environmental Protection Act 1986*

¹² Section 51E *Environmental Protection Act 1986*

¹³ Section 51O, Schedule 5 *Environmental Protection Act 1986*

¹⁴ Section 51O *Environmental Protection Act 1986*

¹⁵ Section 51O *Environmental Protection Act 1986*

¹⁶ Section 51O *Environmental Protection Act 1986*

¹⁷ Section 51P *Environmental Protection Act 1986*

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 decision¹⁸. The CEO must publish reasons for any decision which is seriously at variance with the clearing principles¹⁹. 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 Policy²⁰.

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 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 vegetation²¹. 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 system²². 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.

¹⁸ Section 51O *Environmental Protection Act 1986*

¹⁹ Section 51Q *Environmental Protection Act 1986*

²⁰ Section 51P *Environmental Protection Act 1986*

²¹ Section 51H *Environmental Protection Act 1986*

²² Section 51I *Environmental Protection Act 1986*

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 permit²³. 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 permit²⁴. 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 permit²⁵.

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 taken²⁶.

Issues

- ⊘ 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 licensee'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 changed²⁷. 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 permit²⁸. However, the CEO does not have to seek comments from any third parties about the proposed transfer.

²³ Section 51K *Environmental Protection Act 1986*

²⁴ Section 51O *Environmental Protection Act 1986*

²⁵ Section 51L *Environmental Protection Act 1986*

²⁶ Section 51M *Environmental Protection Act 1986*

²⁷ Section 51N *Environmental Protection Act 1986*

²⁸ Section 51O *Environmental Protection Act 1986*

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 transferee'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 offence²⁹. 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 offence³⁰. 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;
- € 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 decision³¹.

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 determined³². 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 determined³³. 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

²⁹ Section 51J *Environmental Protection Act 1986*

³⁰ Schedule 1 item 1E *Environmental Protection Act 1986*

³¹ Section 101A *Environmental Protection Act 1986*

³² Section 105 *Environmental Protection Act 1986*

³³ Section 101A (3) (b) and 101A (7) *Environmental Protection Act 1986*

Record of clearing permits

The DEP must keep a record of all clearing permits, applications for clearing permits and transfers of clearing permits³⁴.

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 proposal³⁵. Any decision which the CEO makes about the clearing permit must then be in accordance with the Minister's decision.

Lawful authority

A clearing permit is not required if clearing is carried out in accordance with another "lawful authority"³⁶. "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.

³⁴ Section 5Q *Environmental Protection Act 1986*

³⁵ Section 51F *Environmental Protection Act 1986*

³⁶ Schedule 6 *Environmental Protection Act 1986*

Vegetation conservation notices

“Vegetation conservation notices” are notices which require a person to repair damage, re-establish vegetation or prevent erosion³⁷. 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 authority³⁸.

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”³⁹. 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 degradation⁴⁰, 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

³⁷ Section 70 *Environmental Protection Act 1986*

³⁸ Section 51S *Environmental Protection Act 1986*

³⁹ Section 50A, 50B *Environmental Protection Act 1986*

⁴⁰ Section 3A *Environmental Protection Act 1986*

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 individual⁴¹.

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 individual⁴².

Issues

∄ It is not “environmental harm” to damage aquatic animals.

Definition of pollution

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 radiation⁴³.

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 etc⁴⁴.

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 law⁴⁵. 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.)

⁴¹ Schedule 1 *Environmental Protection Act 1986*

⁴² Schedule 1 *Environmental Protection Act 1986*

⁴³ Section 3 *Environmental Protection Act 1986*

⁴⁴ Section 74A *Environmental Protection Act 1986*

⁴⁵ Section 74B *Environmental Protection Act 1986*

The defences which currently exist in respect of causing pollution will also apply to causing environmental harm⁴⁶. 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)

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 offence⁴⁷.

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 Act⁴⁸. 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

⁴⁶ Section 74 *Environmental Protection Act 1986*

⁴⁷ Section 118 *Environmental Protection Act 1986*

⁴⁸ Section 111A *Environmental Protection Act 1986*

prevail over any other State law⁴⁹. 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

- ∄ 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”⁵⁰

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.

⁴⁹ Section 5 *Environmental Protection Act 1986*

⁵⁰ Section 4A *Environmental Protection Act 1986*

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 prosecution⁵¹. 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 time⁵². 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
- 2) the day on which evidence of the alleged offence first came to 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 actions⁵³. 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 Act⁵⁴.

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 matters. 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.

8. Environmental Impact Assessment

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

⁵¹ Section 114 *Environmental Protection Act 1986*

⁵² Section 114A *Environmental Protection Act 1986*

⁵³ Section 121 *Environmental Protection Act 1986*

⁵⁴ Section 121 *Environmental Protection Act 1986*

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.

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.

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.

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).

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 issued 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 decisionmakers should therefore be required to await the strategic assessment before making a decision.

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.

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.

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.

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 Minister 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.

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 public 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.

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.

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).

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).

9. Licensing and works approvals

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.

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.

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.

10. Enforcement

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 an 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 a 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 a 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.

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.

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.

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).

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 had 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.

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 effect for the appeal period.

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

11. 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 or 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.

12. 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.

13. 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.

14. 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.

15. Other Issues

Independent 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.”⁵⁵

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

⁵⁵ Volker, “Just Do It – How the Public Service Made It Work” Volume 8 *Australian Journal of Administrative Law* August 2001 at 204.

polluters the agency is meant to regulate. Requiring environmental agencies to publish reasons for their decisions would have far reaching benefits, including assisting agencies 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 statute which at the same time gives a special and particular remedy for enforcing it... The remedy provided by the statute must be followed.”⁵⁶

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 injunction⁵⁷.

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 1997⁵⁸.

⁵⁶ *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.

⁵⁷ *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

⁵⁸ 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