



Environmental
Defender's
Office

Western Australia (Inc)



CONSERVATION COUNCIL
OF WESTERN AUSTRALIA INC.

Our Ref: NR/141
Your Ref:

17 August 2006

Mr Keiran McNamara
Director General
Department of Environment and Conservation
Level 4
The Atrium
168 St George's Terrace
PERTH WA 6000

Attention: Legislation Section, Legal Services Branch

Dear Sir

**EDO and Conservation Council Joint Submission –
Proposed Amendments to the Environmental Protection Act 1986**

Thank you for the opportunity to provide input into the Department of Environment and Conservation ("DEC") review of the *Environmental Protection Act 1986* ("Act"). The EDO and Conservation Council of WA have taken this opportunity to present a joint response to the issues raised in the *Public Discussion Paper July 2006* ("discussion paper").

Increase of penalties under the Environmental Protection Act 1986

Increased penalties

The EDO and Conservation Council of WA strongly support the increase of penalties under the Act. Current penalty levels do not provide a strong enough deterrent to individuals and companies from committing environmental offences. As noted in the discussion paper, NSW has recently increased its maximum penalties for environmental offences to \$5 million. Penalties for serious offences in the Commonwealth *Environment Protection Biodiversity Conservation Act 1999* ("EPBC Act") are \$5.5 million. There is no reason that WA should be lagging behind other jurisdictions on this issue.

The new penalty levels described in the discussion paper are appropriate for the types of offences listed. The highest penalty level of \$5 million for bodies corporate and \$1 million for individuals will be applied to the three offences that are committed intentionally or with criminal negligence. It is entirely appropriate that penalty levels for these offences are set at a high level to deter environmental harm and to appropriately punish those who have committed offences with intention or criminal negligence. Particularly in the case of bodies corporate, a high penalty should increase

deterrence. As noted by one commentator, “corporate crimes are almost never crimes of passion; they are not spontaneous or emotional but calculated risks taken by rational actors”¹. If the penalty is increased then the risk is increased and the company is less likely to take the risk.

Increases in penalties for the other offences listed in the discussion paper are also appropriate. To be effective, the level of penalty must be considerably higher than the benefits to be gained by committing the offence. Companies and individuals should be prevented from considering the cost of the fine as a necessary part of their business expenses. At present this is often what they do.

Terms of imprisonment

The DEC should also increase terms of imprisonment to correspond with the highest terms in other jurisdictions. Serious offences in the EPBC Act have a term of imprisonment of 7 years. Serious offences in the NSW legislation have a term of imprisonment of 7 years for wilful offences and 4 years for negligent offences. The penalties for WA offences should be raised in line with these Acts.

Minimum penalties

The EDO and Conservation Council of WA support the inclusion of minimum penalties. Where parliament has intended to produce a deterrent effect by imposing substantial penalties, it should not be negated by courts imposing small fines or no financial penalty at all. Minimum penalties have been introduced in the Northern Territory for environmental offences and this standard should be applied in WA.

Civil Penalties

The EDO and Conservation Council of WA support the adoption of civil penalty provisions for less serious offences that do not involve an element of intention/recklessness. The EPBC Act sets the Australian standard for civil penalties in environmental legislation. The maximum penalty that may be imposed by the Federal Court for contravention of a civil penalty provision is \$550,000 for an individual and \$5.5 million for a body corporate. We support inclusion of civil penalties at this level. We would hope that the lower standard of proof and the greater procedural flexibility for civil penalties will encourage DEC to take enforcement action more often in relation to environmental offences.

The advantages of civil penalties have been clearly set out by commentators and include faster proceedings, the ability to obtain orders to remedy damage, and the adoption of a lower standard of proof which is particularly useful in relation to corporations.²

Negotiated civil penalties

The EDO and Conservation Council of WA only support negotiated civil penalties in circumstances where the offence is not serious and where the best outcome is achieved by addressing the environmental damage rather than solely punishing the offender. In these cases the focus should be on offender remediation of environmental damage and ensuring that systems are improved so there is no repeat of the environmental damage. We do however hold some strong concerns with negotiated penalties which should be addressed before such a scheme is implemented.

Our specific concerns with negotiated penalties include:

- The possibility of lack of transparency in the process – records of negotiations should be made public.
- There is as yet no indication as to what criteria will be applied to any negotiations – a clear policy for negotiations should be developed and promulgated for comment prior to implementation

¹ Chappell D and Norberry J, *Detering Pollutors: The Search for Effective Strategies* UNSW Law Journal 13(1) 1990

² For example see Hartley A, *Are criminal penalties the most effective sanction for offences under Part V of the Environmental Protection Act 1986 (WA)*, (2004) 21 EPLC 312.

- Serious offences should not be dealt with by negotiated penalties as the deterrent and punishment factor will be reduced.
- The possibility of imposition of artificially low negotiated penalties – there should be a right of third party appeal in cases where the penalty does not appear to match the offence and/or the criteria for setting penalty levels.
- The risk that negotiated penalties will become the default penalty system over court action because of the lower costs, time and effort involved in securing a negotiated penalty – the use of negotiated penalties should only be allowed in specific circumstances where it is determined that no additional deterrent/punishment benefit would be derived from court action.

Combination of civil and criminal penalties

The proposal in the discussion paper states that no criminal conviction can be recorded if a civil penalty is paid. An alternative would be to impose civil penalties in addition to criminal prosecution for offences that do not include intent. This system is used under USA Federal environmental law and in the EPBC Act³. The DEC could then impose a civil penalty and also refer the matter for prosecution if it was considered appropriate. The criminal prosecution achieves the additional goal of punishment in more serious cases. In addition, if both proceedings can be undertaken simultaneously or sequentially, DEC can delay instituting a criminal prosecution until the scope of the damage is fully understood.⁴ The EDO strongly urges the DEC to adopt this model.

Third party civil penalty proceedings

A further suggestion as part of a civil penalty package is to allow third parties to bring proceedings for the award of civil penalties, as is done under US Federal environmental law. In the USA it is common for environmental organisations to bring proceedings for civil penalty environmental offences, and this relieves some of the enforcement burden of the regulator. US courts have the power to award the civil payments directly to the organisation rather than to consolidated revenue, or alternatively can award payment directly to a specified environmental project. This empowers communities and environmental organisations to take action where an environmental offence has occurred and the regulator is unwilling or unable to enforce the law. The risk of vexatious litigation would be low due to the high cost of bringing an action and the existing provisions that allow courts to throw out frivolous or vexatious litigation.

Calculation of the penalty

The discussion paper does not set out the criteria that will be used to calculate the amount of the civil penalty in each case. The EPBC Act includes some factors which should be considered, namely

- The nature and extent of the contravention;
- The nature and extent of any loss or damage suffered as a result of the contravention;
- The circumstances in which the contravention took place; and
- Whether the person has previously been found by a court in proceedings under the Act to have engaged in any similar conduct.⁵

The EDO and Conservation Council of WA strongly suggest that there should also be a consideration of any financial benefit that the offender may have gained by committing the offence. This is a key factor in determining civil penalties in the US, which Hartley⁶ discusses in detail. The financial benefit that may be gained includes those from delaying compliance, avoiding compliance or achieving an illegal competitive advantage from violating the law.

Section 74 (1a) defence – due diligence

The EDO supports the suggested amendment to the section 74(1a) defence. This section should be amended in line with the NSW defence provision as highlighted in the discussion paper. Where the

³ See section 486C of the EPBC Act

⁴ Hartley, n4

⁵ Section 481(3) EPBC Act

⁶ Hartley n4

causes of the offence are within the offender's control the offender should be held fully responsible for failing to take action that would have prevented the offence.

Such an amendment should prevent a recurrence of the outcome in *Payne v Tiwest Pty Ltd [2005] WASC 141* where a discharge into the atmosphere of gas containing chlorine occurred from a stack at Tiwest's plant, but the emitters were not held responsible. In that case the respondents had control over the causes of the emission but had not implemented the measures that may have prevented the accident because the emission was viewed as highly unlikely. It was held that the due diligence defence was made out because even though the respondents had control over the causes of the emission and were aware of the potential for a leak, the risk of an emission was considered to be so remote that the respondents were entitled to ignore it. An amendment to s74(1a) should address this problem.

Application of section 74 defences to clearing charges

The EDO and Conservation Council of WA have concerns over the proposal to extend the section 74(1)(a) defence to clearing charges. This amendment could have serious unintended consequences when applied to clearing charges, due to its potential use by those wanting to use burning to clear native vegetation.

The proposed amendment could open the way to a burning free-for-all. It may be too easy for an offender to claim that a burn was "for the purpose of preventing danger to human life or health or irreversible damage to a significant portion of the environment" or occurred "as a result of an accident" and escape prosecution. How will it be determined what constitutes "irreversible damage" and what is "a significant portion of the environment"?

The scientific literature indicates that in most ecosystems a single fire, no matter how hot, is unlikely to cause irreversible damage to the environment, whereas even two fires that occur close together can cause a loss of biodiversity.

Already many ecosystems throughout WA are suffering from too frequent burning. Fires, whether caused by lightning or humans, are occurring before all the components of the ecosystems have recovered from previous fires. As the Kings Park scientists stated in the Kings Park Bushland Management Plan,⁷

There is increasing evidence in the literature ... and via personal communications from experts in their fields, that frequent fires have a disastrous effect on many species of flora and fauna and the habitat structure.

Therefore any law or regulation that would allow or encourage frequent burning creates a risk to biodiversity. For these reasons, the proposed defence should only apply for burning within a specified distance (say 50 or 60 metres) of places that require protection in order to prevent danger to human life or health, for example a house. It should not apply to broad-scale burning, which if carried out repeatedly at short intervals is a form of clearing and will lead to loss of biodiversity. Regulation 5 item 2 could remain as a defence for burning outside the specified distance if there is imminent danger.

Before land owners and managers can burn bushland outside the specified distance "for the purpose of preventing danger to human life or health or irreversible damage to a significant portion of the environment", they should be required to prepare a fire management plan, which includes risk assessment and risk management: what is the likelihood of a wildfire occurring and how serious would the consequences be if it did occur? The fire management plan should then be approved by the local bushfire officer and environmental officer. Any burning outside the specified distance must be in compliance with that plan.

⁷ Dixon, I. R., Keys, K., Paynter, R., Keighery, B., Dixon, K. W. and Hopper, S. D. (1995) Kings Park Bushland Management Plan 1995-2005. Kings Park and Botanic Garden, Perth.

As in the South Australian Native Vegetation Act, an “accident” should be defined as something which “was not committed intentionally AND did not result from any failure on the part of the defendant to take reasonable care to avoid the commission of the offence”⁸ (emphasis added).

Third party appeals to the Minister on clearing permits – Part VII

The EDO and Conservation Council of WA do not support the removal of the right of third parties to appeal the grant of a clearing permit where the EPA has decided not to assess the proposal under Part IV of the Act. This will leave a gap in the process, where local impacts of clearing may not be fully investigated. The EPA usually refuses to assess many clearing proposals because they perceive the impacts to be localised and therefore not significant on a *regional* scale. This does not, however, affect the fact that the removal of native vegetation is often significant at a *local* level, and impacts on third parties in the local area. The refusal of the EPA to assess local impacts, combined with the removal of the right to appeal the grant of a clearing permit, may result in these impacts not being fully investigated.

Furthermore, the situation that the amendment purports to prevent would only occur a tiny number of cases. Legislative change is not warranted when the only benefit is a small reduction in assessment time for obscure and unlikely circumstances.

Greenhouse gas inventory

The EDO and Conservation Council of WA support the introduction of a WA greenhouse gas inventory. WA should focus on developing and participating in a national mandatory greenhouse gas reporting and reduction scheme, however in the absence of a mandatory national scheme it is appropriate for WA to introduce a state scheme.

Essential elements of a scheme include:

- Reporting on an annual basis
- Inclusion of all emissions above 100,000 tonnes CO₂ equivalent per year of the six Kyoto gases
- Inclusion of direct emissions from fuel combustion (stationary and transport) fugitive emissions, industrial process emissions, agricultural emissions and land management, and indirect emissions from purchased energy and other sources.
- Full public disclosure of emissions on an annual basis similar to the NPI scheme – if mandatory reductions are not required at this stage then there will be no pressure on industry to reduce emissions. Public disclosure of emissions by companies will at least provide some public pressure to reduce emissions.
- Significant penalties for late reporting, false reporting and non-reporting - the proposed increase in penalties available under regulations to \$10,000 may satisfy this requirement, however if penalties in regulations do not increase then provisions should be included in the legislation to allow higher penalties to be imposed.
- Public disclosure of companies who have not reported – negative publicity should provide added incentive for companies to report
- Robust and independent audit and verification processes at regular intervals. This could be satisfied by requiring reporters to organise their own independent audit by a recognised auditor as is done under the AGO Greenhouse Challenge.

The discussion paper states that a head power will be inserted into Schedule 2 and the remainder of the scheme will be contained in regulations. We are of the view that an amendment to Schedule 2 and development of regulations in the absence of an amendment to the body of the Act will not provide sufficient certainty for these provisions and they should instead be included in the Act itself. In particular, this will allow penalties for non-reporting and false reporting to be increased to a level that provides a strong deterrent.

⁸ Section 40 Native Vegetation Act 1991(SA)

Although work is progressing to develop a national mandatory reporting scheme through the EPHC (and failing that, the inclusion of greenhouse gas reporting in the NPI NEPM), it is not clear when (or if) either of these processes will be operational. In addition, particularly in relation to the NPI, it is not certain that they will meet all of WA's objectives. The development of a WA scheme is useful preparation for a national scheme. In the event of a national scheme coming into effect the WA inventory can be reviewed in light of elements of the national scheme.

Termination of a referred proposal

The EDO and Conservation Council of WA support the addition of a power to allow the EPA to terminate a referral of a proposal where information has not been provided within the specified timeframe.

Clarification of the process for a change of proponent

The EDO supports the clarification of the process for changing a proponent, and the requirement for the Minister to be provided with information by the proponents before the transfer is approved. Section 30 of the *Contaminated Sites Act* provides a useful example of the financial information which should be required of proponents when a transfer of proponent is sought.

Implementation "stop order"

The inclusion of an unfettered period of time for the Minister to stop implementation of a proposal is supported.

Section 41(2)(b)

In the discussion paper, the amendment to section 41(2)(b) should refer to section 38(5) not 38(5c).

Section 45(5)

The amendment is supported

Clearing covenants

The EDO and Conservation Council of WA support the inclusion of a scheme for conservation covenants under the Act, but note that this scheme should be as simple as possible to allow straightforward establishment and compliance.

Suggestions for additional amendments

The EDO has a number of suggestions for additional amendments that are required under the EP Act. These are outlined as follows.

- The EDO and Conservation Council of WA strongly suggest that the EP Act should include provision to allow third parties to initiate prosecutions under the Act. Section 79 of the Act allows this in specific circumstances and it is submitted that this should be extended to all offences under the Act. Third party rights would encourage compliant behaviour because it would allow the community to monitor and enforce breaches that negatively impact on the environment. The risk of spurious action would be very low, due to the cost and time involved in initiating a court action and the current provisions for frivolous or vexatious litigation.
- Where a proposal is changed after it has been assessed under section 45C, the Act should be amended to allow public rights of appeal to the change. This section is often used to change a proposal that in the public's opinion would have a significant detrimental effect on the environment, but there is no opportunity for the public, or parties who are directly affected by the change to raise their concerns.

- Similarly, the Act should allow third party appeals when implementation conditions are amended under section 46 for the same reasons as above.
- Although section 41A prevents a person from implementing a proposal that is to be assessed once the EPA *decides* that it is to be assessed, there is nothing to stop actions being taken to implement a proposal from the time it is *referred* to the EPA. Section 41 prevents decision-making bodies from making any decisions from the time of referral, but it does not prevent the proponent from beginning works to implement the proposal. A provision should be inserted setting this out. At the least, action should be prevented from the time an appeal on whether or not the proposal requires assessment is initiated.
- A separate head power should be inserted into the Act which allows regulations to be made requiring annual compliance statements, and an averment included in the Act to state that the matters in annual compliance statement are true for the purposes of any enforcement action.
- Although conditions imposed under works approvals and licences can be appealed by third parties, the issuing of the works approvals and licences themselves cannot be appealed by third parties. This is inconsistent with Part IV of the Act and with native vegetation clearing permits, where the decision to assess a proposal and the issue of a clearing permit can be appealed by third parties. This provision is particularly crucial in relation to works approvals as a works approval may be the first approval that a company seeks when establishing a new premises and therefore this may be the only chance to deal with the full range of siting issues, rather than just conditions. The issue of works approvals and licences should be able to be appealed by third parties.
- The Act should be amended to require holders of approvals (all types) and orders to pay for the costs of having an independent audit of activities under that permit provided to DEC.
- Provisions should be inserted into the Act reinforcing the right of the public to access information collected under the Act, including emissions data. The public should be able to access this information without having to resort to FOI requests, based on both their right to access information that will directly affect their private rights, and their right to access information that is in the public interest.
- The Act should be amended to include a provision that requires the decision-maker to provide reasons for a decision on request. Currently reasons for a decision can be requested but there is no provision that requires the DEC to provide these reasons. This is out of step with many other laws in Australia including the EPBC Act⁹.
- Section 48I of the Act should be amended to allow *third parties* as well as the responsible authority to refer proposals to the EPA that were not assessed as part of an assessed scheme. It is the EDO's experience that responsible authorities are not always willing to refer a proposal to the EPA which was not assessed under an assessed scheme even when there are serious environmental issues that have not previously been considered.¹⁰
- The Act currently provides that a person has 21 days to appeal the issue of a clearing permit, but has 28 days to appeal the conditions. This should be amended to provide a consistent appeal period of 28 days. The appeals period should start on the day that the decision to grant a permit is published, not the day the applicant is advised. This provision clearly disadvantages third parties who wish to appeal, as they will not know when the applicant is advised.

⁹ See for example section 77 of the EPBC Act

¹⁰ For example the refusal of the WAPC to refer the Stockland South Beach proposal in relation to contaminated site issues.

- People who make complaints about conduct that they believe constitutes a breach of the Act should have the right to be advised of any enforcement action that is taken to remedy the breach. The WA Ombudsman recommends that whenever a complaint is filed with an agency, the complainant be informed of any action that has been taken¹¹. There is a common law principle that the name of a party against whom DEC is taking enforcement action cannot be mentioned before the first court appearance for that breach, however this can be extinguished by a provision in the Act. This is in fact already implied in the Act by fact that people can appeal an environmental protections notice under the Act.

The EDO and Conservation Council of WA would be happy to discuss this submission and the proposed amendments listed above in more detail with the DEC if required.

Yours sincerely,

Nicola Rivers
Solicitor
Environmental Defender's Office

Chris Tallentire
Director
Conservation Council of WA

¹¹ See WA Ombudsman, *Ombudsman's guide for conducting administrative investigations* 2003 at < <http://www.ombudsman.wa.gov.au> >