

28 January 2020

Strategy Policy - Environmental Protection Act 1986 Amendments
Department of Water Environmental Regulation
Locked Bag 10
JOONDALUP DC WA 6919



Environment Institute
of Australia and
New Zealand Inc.

Dear Sir / Madam

RE: Submission on Proposed Amendments to the *Environmental Protection Act 1986*

The Environment Institute of Australia and New Zealand (EIANZ or Institute) Western Australia Division (EIANZ-WA) is pleased to provide feedback on the proposed amendments to the Western Australian *Environmental Protection Act 1986* (the Act). This submission is made on the basis of information presented in the following documents that were released on 28 October 2019 for public comment:

- Environmental Protection Amendment Draft Exposure Bill, 2019.
- Modernising the Environmental Protection Act, Discussion Paper, October 2019.

We are a not-for-profit, professional association for environmental practitioners. EIANZ promotes independent and interdisciplinary discussion on environmental issues and advocates good practice environmental management delivered by competent and ethical environmental practitioners.

We forward this submission on behalf of the EIANZ-WA members. Currently, we have 164 members in WA while across Australia and New Zealand we have over 2000 members. Our members come from a range of technical disciplines including certified environmental practitioners (CENVP), ecological consultants, environmental advocates and environmental specialists working in government, industry and the community.

Specific comments are made against proposed changes in Attachment 1 to this letter. In its assessment of the proposed amendments, EIANZ-WA has primarily considered the following:

- Are the changes consistent with the objectives of the Act and do they serve to promote and enhance achievement of the principles of the Act?
- Do the changes modernise the Act, in consideration of emerging environmental law discourse and societal goals?

To this end, EIANZ-WA provides the following commentary on the proposed amendments:

- Overall, the proposed amendments do not deliver a fundamental modernisation of the Act, although it is noted that some of the proposed changes (e.g. changes to the Part IV Section 38) may have the effect of increasing the efficiency of the environmental impact assessment (EIA) process.
- Changes proposed under Section 39A(3) and Section 44 (2AA) have the potential to compromise the integrity of EIA and impact mitigation by transferring responsibility for assessments to other decision-making authorities under other legislation which do not have a focus on environmental protection. Any proposal that has the potential to result in a significant impact to the environment should be assessed by the EPA under

the provisions of the Act. Transfer of EIA processes to other decision-making-authorities, where the impact may be significant, weakens the ability of the State to achieve the objectives of the Act, particularly where the delegated Decision-Making Authority (DMA) is confined by a differing set of objectives.

- Changes to Section 45 (1A, 1B, 1C and 1D) empower the Minister to determine which other DMAs/Ministers have a major role in making decisions in relation to the proposal and reinforces/strengthens the requirement for the Minister to consult with other Ministers and DMAs in determining whether or not a proposal can be implemented. Section 45(6)(a)(ii) has also been amended to reflect the determination of the Supreme Court of Appeal (WASCA 102)¹ which upheld that the Minister's decision is not constrained by any involvement with, nor findings of, the EPA report and its recommendations. EIANZ-WA does not contest the scope of the Minister's role to take into account broader economic and social considerations, however, as a matter of transparency and accountability, EIANZ-WA considers that when such decisions are contrary to the EPA report, the Minister should be required to publish a detailed decision document. The decision document should clearly delineate the rationale for the decision, including detailed discussion on how the objectives of the Act are being met and how the decision benefits the broader community.
- It is our interpretation that the amendments to Section 46 (c) provide for the Minister to make changes to implementation conditions without assessment by the EPA or DWER, where the Minister considers that implementation of the proposal under the changed implementation conditions will not have a significant detrimental effect on the environment. In the absence of any assessment by an appropriately qualified person/s, it is not clear how it will be determined if a change to implementation conditions can be assessed as not having a detrimental effect on the environment. Similarly, changes to Section 47A which allows the Minister to revoke a Ministerial Statement if the Minister is satisfied that the implementation conditions have been complied with, or are no longer needed, raise concerns about the adequacy of this approach on proposals that may have specific public interest concerns, or where regulation is transferred to DMAs that are confined by a differing set of objectives.
- Inclusion of a clearing permit referral process may result in unnecessary administration (e.g. where it is apparent that a clearing permit is required) as well as potentially exacerbating a growing cumulative impact to native vegetation that is not adequately monitored by the State. The current exemptions (e.g. 10 ha clearing exemption per financial year per tenement for approved mining activities) already have the potential for significant, long-term cumulative impacts to biological diversity. EIANZ encourages a state-wide and regional assessment approach to clearing. Unless an annual clearing report is required for all clearing that occurs in the State, EIANZ does not support further amendments that result in untracked and unregulated clearing by DWER.
- Proposed changes to Part V works approvals and licences require more detailed discussion and consultation. EIANZ-WA does not oppose the use of one instrument to regulate controlled works and prescribed activities, however, the process of transitioning from controlled works to activities needs to be delineated to ensure that the works stage is adequately audited to safeguard the environment prior to granting approval to undertake prescribed activities. We would welcome further consultation and discussion on the practical implementation of these changes. In lieu of further delineation of this process, EIANZ-WA does not support the change.

¹ This related to the Yeelirrie Project and a challenge by the Conservation Council of Western Australia on the validity of the Ministerial Statement

- EIANZ-WA promotes best-practice environmental impact assessment and management, however, has concerns about the implications (prosecutions and liability) of changes to defences under Section 74A. Specifically, the narrowing of the defence available to pollution (emissions), to only those emissions that are expressly regulated by the licence. This raises concerns about accidental exceedance or unforeseen emissions that may only be identified during the commissioning phase or in operations, where variability is encountered and detected through monitoring. As environmental practitioners, EIANZ-WA prefers a more flexible approach to determining emissions and appropriate limits. This could be done through inclusion of a monitoring condition in licences that may result in amendments to licences where there is a change in emissions, but which should not necessarily be considered an offence, simply because it wasn't captured in the original analysis. Notification timelines should be included when changes to emissions are identified.
- EIANZ-WA supports changes under Section 48AA that enable cost recovery for Part IV assessments, however, only on the understanding that all fees under Part IV should go directly to funding resources to enable more effective and efficient environmental impact assessment.
- EIANZ-WA supports the concept of cost recovery of Environmental Management Programs however there needs to be more information on how this will be determined and how the cost will be allocated to proponents. A transparent approach is required rather than industry being lumped with government costs. As part of this, we would expect that the collected monitoring data would be made available to the community and proponents.
- EIANZ-WA supports changes under Section 51 to expand the definition of "environmental undertaking" to include biodiversity conservation covenants and agreements made under the *Biodiversity Conservation Act 2016* and environmental protection covenants under a new Part VB of the EP Act. EIANZ-WA view this as a mechanism to enhance protection of the environmental values of the State.
- EIANZ-WA supports changes under Schedule 2 (5A) to establish a scheme for the accreditation of environmental practitioners. We look forward to further consultation on how this might be implemented to assist in improving the quality of environmental impact assessment and management.

The above commentary specifically relates to the proposed changes to the Act. In addition, EIANZ-WA considers that a genuine modernisation of the Act must include a detailed assessment of objects, principles and reforms that are being discussed in national and global forums. This should entail explicit inclusion of broader global issues that are relevant to the State, including but not limited to, climate change, cumulative impact assessment and the centrality of evidence-based science in decision making. EIANZ-WA feels that the proposed reforms are the first stage of a multi-step reform agenda.

EIANZ-WA encourages future reforms to the Act to include greater public involvement in combination with an expert panel to provide recommendations on amendments (as has occurred in Victoria).

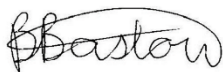
With this in mind, we identify the following key areas that we would like to see addressed in future reviews of the EP Act:

- Accountability and Transparency of the Minister: EIANZ-WA would strongly support inclusion of a requirement for the Minister to publish a detailed decision document on implementation decisions, when the decision is contrary to the EPA Report.

- Review of Objects and Principles: A more wholistic review of objects and principles is required to determine relevance and the need for amendment and/or expansion.
- Effectiveness of the Act: Review of the adequacy of the Act and Regulations in terms of delivering on the objectives of the Act.
- General Environmental Duty (GED): Inclusion of a GED on all Western Australians to not cause environmental harm.
- Chief Environmental Scientist: Establishment of a Chief Environmental Scientist role within the EPA.
- Bioregional Assessments: Include a requirement for the EPA and DWER to undertake periodic bioregional assessments to establish the key environmental issues in each bioregion and issue management plans for those bioregions to identify for proponents and the public how it proposes objectives for management of those issues. This may identify issues that would result in a 'do not proceed' guidance where projects impact highly significant values.
- State of the Environment Report: Inclusion of a legislative requirement for the EPA or DWER to produce a State of the Environment Report on a regular basis similar to Victoria and South Australia. This is an important mechanism for identifying significant threats to the environment of the State and enabling sound policies to be developed which can then guide legislation.
- Strategic Assessments: Include provision for a formal process for strategic environmental assessment.
- Legislative Framework for Cumulative Impact Assessment: This may include a requirement for regional strategic assessments to guide cumulative impact assessment for proposals.
- Sustainability: Encourage creativity and innovation in developments beyond compliance by offering financial discounts and/or support for sustainability commitments such as carbon neutrality, climate change adaptation measures, on site retention, maintaining ecological corridors/linkages and strategic landscape scale offsets.

We thank the Department for the opportunity to comment on proposed amendments to the Western Australian *Environmental Protection Act 1986*. If there are any queries regarding this submission, please contact Belinda Bastow, President EIANZ-WA Division on wa@eianz.org

Yours sincerely



Belinda Bastow
President
EIANZ – WA Division